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Removal and the Eleventh Amendment: The Case for District Court Remand Discretion To Avoid a Bifurcated Suit

Mitchell N. Berman
University of Pennsylvania Carey Law School

NOTES

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INTRODUCTION

A plaintiff files suit in state court alleging a federal cause of action. The suit names two defendants, a private actor and a state actor. The private defendant, noting that the "civil action arises under federal law" and therefore falls within the federal courts' original federal question jurisdiction,[1] seeks to remove the case to federal court pursuant to 28 U.S.C. § 1441(a).[2] In accord with federal procedures, she files a notice of removal in the federal district court for the district in which the state court resides.[3]

The plaintiff, however, prefers that the case remain intact and that the state court adjudicate the claims against both defendants. He files a motion for remand in the federal court to which the private defendant has removed the action. The plaintiff's motion argues that, because the Eleventh Amendment forbids the federal district court from exercising jurisdiction over the state defendant,[4] removal is improper.

Federal courts have disagreed as to whether the private defendant

1. "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (1988).

2. 28 U.S.C. § 1441(a) (1988) permits defendants to remove actions over which the federal district courts have original jurisdiction. *See infra* text accompanying note 65. There are two main heads of original federal jurisdiction. In addition to the federal question jurisdiction of § 1331, 28 U.S.C. § 1332(a) (1988) provides for original federal jurisdiction when the parties are of diverse citizenship. *See infra* note 67.

The hypothetical in the text focuses with reason on federal question, rather than diversity, jurisdiction. The lion's share of this Note concerns discretionary remand of claims against private defendants after the case has been properly removed. Part I will observe that cases involving state defendants are sometimes removable on federal question grounds, but never on the basis of diversity of citizenship.

3. *See infra* notes 74-77 and accompanying text.

4. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. Judicial construction of the Amendment has departed far from its text. For example, the Supreme Court has held that the Amendment bars federal jurisdiction over suits against a state by its own citizens, Hans v. Louisiana, 134 U.S. 1 (1890), and by foreign governments. Principality of Monaco v. Mississippi, 292 U.S. 313 (1934). It has also extended the Eleventh Amendment bar from "suits in law or equity" to suits in admiralty. *Ex parte* New York, 256 U.S. 490 (1921). For a brief overview of Eleventh Amendment jurisprudence, see *infra* section I.A. For convenience, unless otherwise specified, mention in this Note of a claim against a state refers to a claim that is barred by the Eleventh Amendment.

can remove the claims against her, thereby bifurcating the plaintiff's suit, or whether the Eleventh Amendment prevents even the private defendant from securing a federal forum. The Fifth Circuit, in *McKay v. Boyd Construction Co.*,[5] held that the Eleventh Amendment bars removal of all the claims in the case. It directed the district court to remand the claims against both defendants to the state court.[6] The Sixth Circuit, in *Henry v. Metropolitan Sewer District*,[7] repudiated *McKay*. The court held that a case naming both state and private defendants was removable in its entirety, but that the federal district court must both remand the claims against the state defendant and adjudicate the claims against the private defendant.

This Note concludes that the Sixth Circuit was half right: when a civil action names both state and private defendants — what this Note terms a "mixed case" — and when the claims against private defendants arise under federal law, the district court must grant removal of the case[8] and must remand the claims against the state defendant. However, this Note also observes that the Fifth Circuit probably achieved the better result. After defendants have removed a mixed case to federal court and the district court has remanded the barred claims, the dual court systems and the parties will usually benefit from disposition of the entire case in one proceeding.

Accordingly, the significant question that *Henry* raises — but that the court failed to consider — is whether the district court may remand the claims that it is permitted to hear, along with those claims that the Eleventh Amendment bars, to state court in order to avoid a bifurcated cause of action. This Note argues that, contrary to prevailing wisdom, both the federal removal statutes and relevant Supreme Court precedent grant district courts sufficient discretion to remand such claims even though they fall within the federal courts' jurisdiction.

Part I examines whether a private defendant may remove a case to federal court when the plaintiff's suit also names a state defendant. Part I briefly introduces both Eleventh Amendment jurisprudence and

5. 769 F.2d 1084 (5th Cir. 1985).

6. The Fifth Circuit analyzed the issue on the assumption that the private defendant had sought to remove the case on the basis of federal diversity jurisdiction. The court's analysis, however, would apply in an identical fashion had the private defendant invoked federal question jurisdiction. Indeed, three district courts in the Ninth Circuit followed *McKay's* reasoning in cases involving attempts to remove on the basis of federal question jurisdiction: Simmons v. California, 740 F. Supp. 781 (E.D. Cal. 1990); Kelly v. California, 687 F. Supp. 1494 (D. Nev. 1988), *affd.*, 880 F.2d 416 (9th Cir. 1989); Stephans v. Nevada, 685 F. Supp. 217 (D. Nev. 1988).

7. 922 F.2d 332 (6th Cir. 1990).

8. This Note uses the terms *civil action, suit,* and *case* interchangeably, in accord with the Revision Notes to § 1441. *See, e.g.*, Nolan v. Boeing Co., 919 F.2d 1058, 1066 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 1587 (1991). In the 1948 Revision, Congress replaced words like "case," "cause," and "suit" with the term "civil action" to harmonize the Judicial Code with the Federal Rules of Civil Procedure, adopted 10 years earlier. 28 U.S.C. § 1441 (1988) (historical and revision notes).

the federal removal statutes. It then demonstrates that no part of a mixed case is removable when the private defendant seeks to rely on the federal courts' diversity jurisdiction. Lastly, it concludes that the presence of barred claims does not render nonremovable a civil action that lies within original federal question jurisdiction. A mixed case is removable in its entirety when the claim against the private defendant arises under federal law.

Part II poses the question whether, after the federal district court remands the claims against the state defendant to state court, the federal court should remand or adjudicate the remaining claims against the private defendant. This Part argues that considerations of judicial economy and fairness will often recommend that the court remand the *nonbarred* claims as well. It proposes that the proper disposition of the claims against the private defendant can best be realized by investing the district court with ad hoc remand discretion.

Whereas Part II is prescriptive, Parts III and IV are descriptive. Together, they conclude that the existing legal framework permits a district court to exercise remand discretion to avoid a bifurcated suit. Part III analyzes existing Supreme Court caselaw, focusing in particular on the Court's holding in *Carnegie-Mellon University v. Cohill*[9] that a district court possesses discretion to remand pendent state law claims when it has assumed jurisdiction over a case via removal and all the federal question claims have been either resolved or dismissed. This Part concludes that *Carnegie-Mellon* is predicated on the Court's affirmation of inherent district court discretion to remand actions in the interests of judicial economy, convenience, fairness, and comity. Such reasoning would permit remand discretion in Eleventh Amendment actions to prevent a bifurcated suit.

Part IV begins by noting that, however the reasoning in *Carnegie-Mellon* is characterized, its methodology is clear: the Supreme Court approved of extrastatutory remand discretion as an exercise of its common law power to supplement statutory rules of jurisdiction; it did not engage in statutory interpretation. This Part, consequently, undertakes the oft-bypassed task of interpreting the remand provision, 28 U.S.C. § 1447(c).[10] Employing standard methods of statutory construction, Part IV determines that, properly understood, section 1447(c) authorizes district court discretion to remand nonbarred federal question claims when necessary to avoid a bifurcated suit. This Note concludes that, whether applying the common law reasoning of Supreme Court precedent or undertaking statutory interpretation on its own, a federal district court confronting a removed mixed case can and should assume discretion to remand nonbarred federal question claims when remanding claims barred by the Eleventh Amendment.

9. 484 U.S. 343 (1988).

10. This provision is reproduced *infra* in text accompanying note 78.

I. REMOVAL AND THE ELEVENTH AMENDMENT

This Part argues that the Eleventh Amendment permits removal of a case that contains federal question claims against private defendants even if the complaint names a state defendant. Sections I.A and I.B respectively provide brief introductions to Eleventh Amendment jurisprudence and the removal statutes. The next two sections explore mixed-case removal. Section I.C examines mixed-case diversity removal. It demonstrates that, aside from considerations of the Eleventh Amendment, the presence of a state defendant destroys complete diversity. Accordingly, actions that name both state and private defendants are not removable on the basis of the federal courts' diversity jurisdiction. Section I.D examines mixed-case federal question removal. It concludes that mixed cases are removable when the barred claims and the nonbarred federal question claims are either "separate and independent" within the meaning of 28 U.S.C. § 1441(c), or part of a single civil action for purposes of section 1441(a).

A. *The Eleventh Amendment*

The passage of the Eleventh Amendment marked the first of what has proven to be that rare event in American democracy, a successful effort to overrule a Supreme Court decision by constitutional amendment.[11] In the offending case, *Chisholm v. Georgia,*[12] the Supreme Court upheld federal jurisdiction over an action to recover debts brought by a South Carolinian against the State of Georgia. Georgia had objected that sovereign immunity protected an unconsenting state from suit in federal court despite the second section of Article III, which extends the judicial power to "controversies . . . between a State and Citizens of another State."[13] A majority of the Justices, writing separately, adhered to the plain language of the constitutional text and rejected Georgia's arguments that the provision was intended only to govern suits commenced by a state and did not reach actions in assumpsit.[14] Public reaction to *Chisholm* was so intensely negative — largely, historians generally agree, due to a fear of an avalanche of suits by British and Tory creditors to recover Revolutionary War debts and seized property[15] — that Congress proposed

11. The most recent Supreme Court decision to provoke a serious effort to amend the Constitution was Texas v. Johnson, 491 U.S. 397 (1989) (holding that the First Amendment protects burning of the U.S. flag). An amendment to prohibit desecration of the U.S. flag was defeated in the House by a narrow margin. *See* Steven A. Holmes, *Amendment To Bar Flag Desecration Fails in the House,* N.Y. TIMES, June 22, 1990, at A1.

12. 2 U.S. (2 Dall.) 419 (1793).

13. U.S. CONST. art. III, § 2, cl. 1. Congress had actualized this power in the Judiciary Act of 1789, ch. 20, 1 Stat. 73.

14. *E.g.,* 2 U.S. (2 Dall.) at 467-69 (opinion of Cushing, J.); 2 U.S. (2 Dall.) at 476-77 (opinion of Jay, C.J.).

15. *See, e.g.,* JOHN V. ORTH, THE JUDICIAL POWER OF THE UNITED STATES: THE

and approved the Eleventh Amendment within three weeks of the *Chisholm* decision. The states ratified it in less than a year.[16] The Amendment provides: "The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[17]

Despite this compact history, the meaning and, therefore, the proper doctrinal contours of the Eleventh Amendment have been much debated. Scholars and Justices have advanced at least three distinct theories of the Amendment's intended purpose, each entailing different practical consequences.[18] First, the dominant view in Supreme Court caselaw is that the Amendment constitutionalizes state sovereign immunity, thereby preventing a state from being sued in federal court without its consent.[19] Second, a minority of the Court, initially led by Justice Brennan, has come to view the Amendment solely as a restriction on federal diversity jurisdiction. Under this view, the Amendment does not bar actions based on the federal courts' federal question and admiralty jurisdiction.[20] The third perspective urges that the Amendment was intended merely to reestablish the states' common law immunity that *Chisholm* had seemingly abrogated. This theory would permit Congress, but not the federal bench, to authorize suits against a state in federal court.[21] Given the impressive number of

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ELEVENTH AMENDMENT IN AMERICAN HISTORY 7 (1987); 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 99 (1932). *But see* CLYDE E. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 69-70 (1972) (arguing that, by the time of *Chisholm,* most states were willing and able to satisfy their outstanding debts).

16. Nonetheless, for reasons of politics and administrative delay, Presidents Washington and Adams withheld recognition for three years. Consequently, the Eleventh Amendment is usually dated from 1798. *See* ORTH, *supra* note 15, at 20-21.

17. U.S. CONST. amend. XI.

18. ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 7.3 (1989) sets out the following useful three-part schema.

19. *See, e.g.,* Welch v. Texas Dept. of Highways & Pub. Transp., 483 U.S. 468, 486-88 (1987); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984); Principality of Monaco v. Mississippi, 292 U.S. 313, 322-28 (1934); Hans v. Louisiana, 134 U.S. 1, 10-16 (1890).

20. *See, e.g., Welch,* 483 U.S. at 509-16 (Brennan, J., dissenting); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 258-99 (1985) (Brennan, J., dissenting). In both *Welch* and *Atascadero,* Brennan came within one vote of overruling *Hans.*

21. The principal articulation of this theory is found in Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines* (pts. 1 & 2), 126 U. PA. L. REV. 515, 1203 (1977-1978). *See also* John E. Nowak, *The Scope of Congressional Power To Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments,* 75 COLUM. L. REV. 1413 (1975); Laurence H. Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism,* 89 HARV. L. REV. 682 (1976). For a brief discussion of some of Field's disagreements with Tribe and Nowak, see Field, *supra* (pt. 2), at 1258-61 & n.259.

Justice Brennan had espoused this third theory prior to adopting the "diversity theory" of the Amendment. *See, e.g.,* Employees of the Dept. of Pub. Health & Welfare v. Department of Pub. Health & Welfare, 411 U.S. 279, 309-22 (1973) (Brennan, J., dissenting).

commentators who have entered the debate in the last several years,[22] a thorough examination of the strengths and weaknesses of each of the theories is beyond the scope of this Note. Whatever may be the best historical understanding of the Amendment, most contemporary commentators would agree with Judge Gibbons that "[t]he eleventh amendment today represents little more than a hodgepodge of confusing and intellectually indefensible judge-made law."[23]

An understanding of that hodgepodge begins with the 1890 case of *Hans v. Louisiana.*[24] In *Hans,* the Court expressly interpreted the Eleventh Amendment as the constitutionalization of state sovereign immunity.[25] *Hans* held that the Amendment bars federal jurisdiction over suits against a state brought by that state's own citizens despite its explicit textual limitation to suits commenced by citizens of another state, or by citizens or subjects of any foreign state.[26] The Court has formally operated under this theory ever since, holding, for example, that the Amendment also bars suits in admiralty[27] and suits brought by foreign countries.[28] Similarly, the Court has declared that damages actions against state officers in their official capacities are barred when relief would run against the state treasury.[29]

Against this broad deference to state sovereignty, however, the Court has weighed the competing need to vindicate the supremacy of federal law.[30] Thus, it held early on that the Amendment does not

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22. Although a simple dichotomy necessarily oversimplifies, the present debate largely pits advocates of the diversity theory against its opponents. *Compare* Akhil R. Amar, *Of Sovereignty and Federalism,* 96 YALE L.J. 1425 (1987); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction,* 35 STAN. L. REV. 1033 (1983); H. Stephen Harris, Jr. & Michael P. Kenny, *Eleventh Amendment Jurisprudence After* Atascadero: *The Coming Clash with Antitrust, Copyright, and Other Causes of Action over Which the Federal Courts Have Exclusive Jurisdiction,* 37 EMORY L.J. 645 (1988); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity,* 98 YALE L.J. 1 (1988) *and* Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment,* 102 HARV. L. REV. 1342 (1989) (all critiquing *Hans*) *with* William P. Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation,* 102 HARV. L. REV. 1372 (1989) *and* Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments,* 56 U. CHI. L. REV. 61 (1989) (arguing that the "revisionists" have not satisfied their heavy burden to change century-old doctrine).

23. John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation,* 83 COLUM. L. REV. 1889, 1891 (1983); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 173 (2d ed. 1988); George D. Brown, *Has the Supreme Court Confessed Error on the Eleventh Amendment? Revisionist Scholarship and State Immunity,* 68 N.C. L. REV. 867, 891 (1990).

24. 134 U.S. 1 (1890).

25. 134 U.S. at 15.

26. 134 U.S. at 15.

27. *Ex parte* New York, 256 U.S. 490, 498 (1921).

28. Principality of Monaco v. Mississippi, 292 U.S. 313, 321-30 (1934).

29. *See, e.g.,* Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 (1945). Damages actions against officers in their individual capacities are not barred, even when state law would require indemnification. *See* CHEMERINSKY, *supra* note 18, at 348.

30. *See, e.g.,* CHEMERINSKY, *supra* note 18, at 336-39.

preclude federal appellate review of state court decisions involving state defendants, reasoning in part that a writ of error is not a "suit."[31] Most significantly, in *Ex parte Young*[32] the Court held that the Eleventh Amendment does not bar federal jurisdiction over suits against individual state officers to enjoin violations of federal law. The Court explained that, because a state cannot authorize its functionaries to violate federal law, any such conduct by an officer of the state is ultra vires and thereby unprotected by the state's immunity.[33] Although this reasoning has long struck commentators as fictional,[34] the result seems essential to vindicate federal law.[35]

The Court's ad hoc balancing of state and federal interests similarly explains the bulk of Eleventh Amendment doctrine. In *Edelman v. Jordan,*[36] the Court refined *Ex parte Young* by holding that the latter permits prospective, but not retroactive, relief such as restitution, even while acknowledging that compliance with an injunction can impose a significant financial burden on the state itself.[37] The Amendment generally shields state agencies and departments,[38] but not counties or municipalities.[39] A state can waive its Eleventh Amendment immunity either by an unambiguous statement of intent[40]

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31. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 379-83, 407-11 (1821).

32. 209 U.S. 123 (1908).

33. 209 U.S. at 159-60.

34. *See, e.g.,* MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 193-203 (2d ed. 1990); TRIBE, *supra* note 23, at 189; 13 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3524, at 154 (1984); Gibbons, *supra* note 23, at 1891. Making the applicability of the Eleventh Amendment turn on whether the nominal defendant is a state officer or the state itself serves the fiction that federal courts heed the express constitutional command that they not hear suits in law or equity against the states. It is a rare exception to the principle that courts will not be misled by the nominal identification of parties. *See, e.g.,* Hawaii v. Standard Oil Co., 405 U.S. 251, 258 n.12 (1978); New Hampshire v. Louisiana, 108 U.S. 76, 88-91 (1883).

35. Indeed, the Supreme Court recently acknowledged *Young*'s fictional quality while reaffirming its vitality. *See* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 105 (1984).

36. 415 U.S. 651 (1974).

37. 415 U.S. at 666-68. For cases evidencing the difficulty in applying the distinction between prospective and retrospective relief, see Papasan v. Allain, 478 U.S. 265, 278-81 (1986); Hutto v. Finney, 437 U.S. 678, 689-96 (1978); Milliken v. Bradley, 433 U.S. 267, 288-90 (1977).

38. *See, e.g.,* Florida Dept. of Health & Rehabilitative Servs. v. Florida Nursing Home Assn., 450 U.S. 147 (1981). For a discussion of the inconsistent law in this area, see 13 WRIGHT ET AL., *supra* note 34, § 3524, at 139-50; *see also* Alex E. Rogers, Note, *Clothing State Governmental Entities with Sovereign Immunity,* 92 COLUM. L. REV. 1243 (1992) (critiquing the Court's arm-of-the-state doctrine).

39. *See, e.g.,* Mt. Healthy Sch. Dist. v. Doyle, 429 U.S. 274 (1977); Lincoln County v. Luning, 133 U.S. 529 (1890). Suits that name state officials are permissible only if the substantive law affords relief against the individual actor. *See, e.g.,* Scheuer v. Rhodes, 416 U.S. 232, 237-38 (1974).

40. *See, e.g.,* Welch v. Texas Dept. of Highways & Pub. Transp., 483 U.S. 468, 473 (1987); Edelman v. Jordan, 415 U.S. 651, 673 (1974) ("In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implications [sic] from the text as [will] leave no room for any other reasonable construction.' ") (quoting Murray v. Wilson Distilling Co., 213

or by voluntarily participating in conduct that Congress has expressly stated might subject the state to suit in federal court.[41]

The Court also has recognized that Congress possesses some power to override the Amendment's bar by statute. In *Fitzpatrick v. Bitzer,*[42] a unanimous Court held that Congress may override sovereign immunity when legislating pursuant to section 5 of the Fourteenth Amendment.[43] More recently, the Court held five to four that Congress may abridge the Eleventh Amendment when acting under the Commerce Clause.[44] Whether the Court would likely find that Congress enjoys a similar power when acting pursuant to its other constitutional grants is uncertain.[45] Clearly though, the Court will permit a statute to abrogate Eleventh Amendment immunity only when such congressional intent is unambiguous from the statute's face.[46]

One of the most important recent cases demonstrating the Court's balancing approach to the Eleventh Amendment is *Pennhurst State School & Hospital v. Halderman.*[47] Emphasizing that the federal interest that underlies the *Young* fiction — the interest in enforcing federal law — does not apply when plaintiffs allege state violations of state law, the *Pennhurst* Court held that the federal courts cannot entertain, via pendent jurisdiction, state law claims for injunctive relief against state officials.[48]

U.S. 151, 171 (1909)). Given this exacting standard, courts will not deem a state to forfeit its Eleventh Amendment immunity merely by signing a notice of removal. Equitable sensibilities may suggest that a state, intending not to waive its immunity, should not be allowed to remove a mixed case for the sole purpose of forcing the action to be bifurcated with the hope that plaintiff will pursue only her claims in federal court against the private defendants. The conclusion does not follow, however, that a state should be barred from removing a mixed case unless it also waives its immunity. The likely result of such a rule — the state's withholding of its consent from the removal petition — would be just as unfair to the private defendants who prefer a federal forum. The better conclusion is that, in its exercise of remand discretion, the district court should properly consider whether removal was sought — by either private or state defendants — for the strategic reason of pressuring the plaintiff to forgo a legitimate claim. *See infra* note 185.

41. *See, e.g.,* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 247 (1985).

42. 427 U.S. 445 (1976).

43. U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

44. Pennsylvania v. Union Gas Co., 491 U.S. 1, 14 (1989).

45. Parts of the plurality's reasoning in *Union Gas* appear to limit the case's holding to the Commerce Clause. *See* 491 U.S. at 16-19 (emphasizing the self-executing nature of the Dormant Commerce Clause). Justice White cast the deciding vote on the constitutional question, remarking only: "I agree with the conclusion reached by [the plurality], that Congress has the authority under Article I to abrogate the Eleventh Amendment immunity of the States, although I do not agree with much of [its] reasoning." 491 U.S. at 57 (White, J., concurring).

46. *See, e.g.,* Quern v. Jordan, 440 U.S. 332, 345 (1979) (finding that 42 U.S.C. § 1983 does not contain sufficient evidence of congressional intent to abrogate Eleventh Amendment immunity).

47. 465 U.S. 89 (1984). The litigants had appeared before the Court previously. *See* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981). It is the second case that is of interest to this Note, whether referred to as *Pennhurst* or *Pennhurst II.*

48. *Pennhurst II,* 465 U.S. at 103-06. Scholars have criticized *Pennhurst* for ignoring a re-

The final question, most relevant for the issue of mixed-case removal, is whether the Eleventh Amendment applies to individual claims or to entire cases. In other words, is a *suit* "against the state" if some but not all *claims* are against a state? The issue was surely of little moment when the Eleventh Amendment was ratified, given common law rules that effectively limited suits to a single cause of action.[49] With the advent of more permissive joinder rules begun by New York's Field Code in 1848, courts came in a variety of contexts to equate "suit" with "claim."[50] Consistent with this approach, the Supreme Court long assumed, apparently without discussion, that the Eleventh Amendment bar applies to individual *claims;* in cases filed in federal court, the Supreme Court has routinely heard nonbarred federal question claims after dismissing claims against the state.[51] In applying the Eleventh Amendment to pendent state law claims, the *Pennhurst* Court brought the operation of the bar into sharp relief: "A federal court must examine each claim in a case to see if the court's jurisdiction *over that claim* is barred by the Eleventh Amendment."[52] A federal court must both hear nonbarred federal question claims[53] and dismiss the barred ones. Because the plaintiff could then pursue the dismissed claims in state court,[54] the final result might be two separate actions in state and federal court.

Pennhurst involved a suit brought originally in federal court. In

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lated federal interest: plaintiffs should not be required to forfeit their state law claims as the price for seeking federal enforcement of their federal claims. *See, e.g.,* George D. Brown, *Beyond* Pennhurst: *Protective Jurisdiction, the Eleventh Amendment, and the Power of Congress To Enlarge Federal Jurisdiction in Response to the Burger Court,* 71 VA. L. REV. 343 (1985); Erwin Chemerinsky, *State Sovereignty and Federal Court Power: The Eleventh Amendment After* Pennhurst v. Halderman, 12 HAST. CONST. L.Q. 643 (1985); David L. Shapiro, *Wrong Turns: The Eleventh Amendment and the* Pennhurst *Case,* 98 HARV. L. REV. 61 (1984). *But see* Ann Althouse, *How To Build a Separate Sphere: Federal Courts and State Power,* 100 HARV. L. REV. 1485 (1987) (arguing that *Pennhurst* advances the national interest in the effective functioning of states as independent entities).

49. *See* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective,* 135 U. PA. L. REV. 909, 914-16 (1987).

50. *See, e.g.,* Hammer v. British Type Investors, Inc., 15 F. Supp. 497, 499 (S.D.N.Y. 1933) ("[W]here wholly independent causes of action . . . are joined in one suit merely to eliminate separate trials, the proceeding is to be regarded as a combination of suits.").

51. *See, e.g.,* Alabama v. Pugh, 438 U.S. 781 (1978); Scheuer v. Rhodes, 416 U.S. 232 (1974); Edelman v. Jordan, 415 U.S. 651 (1974).

52. 465 U.S. 89, 121 (1984) (emphasis added).

53. The district court likely would also have discretion to hear or dismiss any nonbarred supplemental state law claims. *See infra* notes 268-70 and accompanying text.

54. A state may permit itself to be sued in its own courts even if it does not waive its Eleventh Amendment immunity in federal court. *See, e.g,* Florida Dept. of Health & Rehabilitative Servs. v. Florida Nursing Home Assn., 450 U.S. 147, 149 (1981). A 1977 survey found that at least half the states had, by statute or judicial decision, abrogated or curtailed their immunity in their own courts. *See* Comment, *Avoiding the Eleventh Amendment: A Survey of Escape Devices,* 1977 ARIZ. ST. L.J. 625, 644 n.114.

Henry v. Metropolitan Sewer District,[55] the Sixth Circuit concluded that the result should be the same — that is, two separate actions — if the plaintiff had originally filed the mixed case in state court and the defendants had sought to remove. In contrast, the Fifth Circuit case, *McKay v. Boyd Construction Co.,*[56] held that a mixed case filed originally in state court cannot be removed in whole or part by the defendants.[57] Resolving this conflict requires a brief review of removal.

B. *Removal*

Removal is a statutory procedure whereby defendants may transfer an action from state to federal court.[58] Congress created the right of removal in the Judiciary Act of 1789[59] to shield out-of-state defendants from local prejudice.[60] When, in 1875, Congress provided for original federal jurisdiction over suits arising under federal law,[61] it also extended the removal privilege from diversity to federal question cases.[62] Although Congress has tinkered frequently with its grants of removal authority,[63] the basic removal provision, 28 U.S.C. § 1441(a), has changed little since 1887.[64] The current law reads in relevant part:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and

55. 922 F.2d 332 (6th Cir. 1990). For fuller discussion of this case, see *infra* notes 114-26 and accompanying text.

56. 769 F.2d 1084 (5th Cir. 1985). For a discussion of *McKay,* see *infra* notes 112-13 and accompanying text.

57. Although *McKay* certainly reaches this result, it is not clear that the court contemplated that there should be different final results depending upon whether plaintiff or defendants sought the federal forum. On its face, the *McKay* opinion suggests that the court might simply have misread *Pennhurst* to dictate that a district court dismiss the entirety of a mixed case even when brought by a plaintiff invoking the court's original jurisdiction. Because this reading is demonstrably wrong, section I.D.2 assesses an alternative rationale that could support the *McKay* holding. *See infra* notes 131-50 and accompanying text.

58. Removal is not mentioned in the Constitution and was unknown at common law. *See* Bradford G. Swing, *Federal Common Law Power To Remand a Properly Removed Case,* 136 U. PA. L. REV. 583, 587 (1987). Nonetheless, the constitutionality of the general removal power is firmly established. *See, e.g.,* City of Greenwood v. Peacock, 384 U.S. 808 (1966); Tennessee v. Davis, 100 U.S. 257 (1879). Today the removal statutes comprise chapter 89 of the Judicial Code. 28 U.S.C. §§ 1441-1452 (1988 & Supp. III 1991).

59. Ch. 20, § 12, 1 Stat. 73, 79 (1789).

60. *See, e.g.,* Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 341 (1976) (noting the district court's observation "that the purpose of the removal statute was to prevent prejudice in local courts"); 14A WRIGHT ET AL., *supra* note 34, § 3721 nn.6.1, 7 (1985 & Supp. 1993). For a different explanation of the creation of original diversity jurisdiction, see *infra* note 94.

61. Judiciary Act of 1875, ch. 137, § 1, 18 Stat. 470; *see infra* note 164.

62. Judiciary Act of 1875, ch. 137, 18 Stat. 470.

63. *See* 1A JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 0.156 (2d ed. 1993).

64. Judiciary Act of 1887, ch. 373, 24 Stat. 552, *corrected by* Act of August 13, 1888, ch. 866, 25 Stat. 433.

division embracing the place where such action is pending.[65]

Generally, then, a defendant can remove any suit that the plaintiff originally could have brought in federal court on either federal question[66] or diversity[67] grounds, subject to four qualifications. First, since the plaintiff is "master of his claim," and can choose not to plead federal claims that his facts would have supported,[68] a defendant cannot remove state law claims on the mere ground that, on the same facts, plaintiff *could have* alleged a federal cause of action.[69] Second, diversity cases are not removable so long as any defendant is a citizen of the state in which the plaintiff brings suit.[70] Third, because Congress has "otherwise expressly provided," there are a limited number of situations in which the plaintiff's choice of forum is absolute.[71] Fourth, several provisions, both within[72] and outside of[73] chapter 89, invest

65. 28 U.S.C. § 1441(a) (1988).

66. "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (1988).

67.

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between —
>
> (1) Citizens of different States;
>
> (2) citizens of a State and citizens or subjects of a foreign state;
>
> (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
>
> (4) a foreign state . . . as plaintiff and citizens of a State or of different States.

28 U.S.C. § 1332(a) (1988).

68. *See, e.g.,* Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 (1987); Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 22 (1983) (" '[T]he party who brings a suit is master to decide what law he will rely upon.' ") (quoting Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25 (1913)).

69. On the other hand, the well-pleaded complaint rule that removal, like original, jurisdiction only lies if a federal question appears on the face of the complaint, induces the corollary that a plaintiff cannot defeat removability by "artfully pleading" what is necessarily a question of federal law as a state law claim. *See, e.g.,* Avco Corp. v. Aero Lodge No. 735, Intl. Assn. of Machinists, 376 F.2d 337, 339-340 (6th Cir. 1967), *affd.,* 390 U.S. 557 (1968).

70.

> Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

28 U.S.C. § 1441(b) (1988). That is, if a plaintiff could have sued in federal court on diversity grounds, but chooses to sue in the home state of one of the defendants, the action becomes nonremovable.

71. *See generally* 1A MOORE ET AL., *supra* note 63, at ¶ 0.167[1].

72. *See* 28 U.S.C. § 1441(d) (1988) (foreign state defendants); 28 U.S.C. § 1442(a)(1) (1988) (prosecution of, or suit against, a federal officer); 28 U.S.C. § 1442(a) (1988) (members of the armed forces); 28 U.S.C. § 1443 (1988) (suits in which the defendant will be unable to secure federal civil rights in the state court); 28 U.S.C. § 1444 (1988) (foreclosure actions brought against the United States).

73. *See, e.g.,* 9 U.S.C. § 205 (1988) (allowing removal of arbitration agreements falling under the Foreign Arbitral Awards Convention); 12 U.S.C. § 632 (1988) (involving international or foreign banking); 12 U.S.C § 1819(b) (Supp. IV 1992) (permitting removal by the FDIC); 22

defendants with a right to remove cases over which federal courts would otherwise lack original jurisdiction.

On paper, removal procedure is straightforward.[74] Defendants[75] who wish to remove any civil action pending in state court must file a notice of removal in the U.S. district court for the district and division in which such action is pending.[76] They must also file a copy of the notice in the state court and give written notice to all adverse parties. At this point, removal is effective, and the state court shall proceed no further unless and until the federal district court remands the case.[77] Section 1447(c) ostensibly governs a district court's power to remand. It reads in relevant part:

> A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.[78]

Common wisdom held for years that, with one exception,[79] section 1447(c) sets forth the exclusive bases for remand: defect in removal procedure and lack of subject matter jurisdiction.[80] In 1988, in

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U.S.C. § 286(g) (1988) (permitting removal by the International Monetary Fund and the International Bank for Reconstruction and Development).

74. As is often the case, however, practice comports imperfectly with theory. *See, e.g.*, Smith v. McDonnell Douglas Corp., 612 F. Supp. 364, 365 (N.D. Ill. 1985) (removal is "fraught with arcane mysteries . . . [and] filled with technical pitfalls for the unwary"). Confusion attaches to such seemingly simple details as determining the date from which the 30-day time limit for removal runs. *See* Robert P. Faulkner, *The Courtesy Copy Trap: Untimely Removal from State to Federal Court*, 52 MD. L. REV. 374 (1993).

75. The phrase used in § 1446(a), "defendant or defendants," has long been construed as requiring all defendants to join in a petition for removal. *See, e.g.*, Chicago, Rock I. & Pac. Ry. v. Martin, 178 U.S. 245, 248 (1900). Despite the American Law Institute's 1968 proposal that the rule be abolished, *see* AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, TENTATIVE DRAFT NO. 5, at 217-18 (1967) [hereinafter ALI STUDY DRAFT NO. 5] (commentary to § 1381), it is still the law. *See, e.g.*, Emrich v. Touche Ross & Co., 846 F.2d 1190, 1193 n.1 (9th Cir. 1988); Getty Oil Corp. v. Insurance Co. of N. Am., 841 F.2d 1254, 1262 (5th Cir. 1988).

76. 28 U.S.C. § 1446(a) (1988). The defendant must file the notice within 30 days from receipt either of the initial pleading, or, if the case stated by the initial pleading is not removable, of the amended pleading that first confers removability. 28 U.S.C. § 1446(b) (1988).

77. 28 U.S.C. § 1446(d) (1988). It bears emphasis that removal is automatic upon the defendants' completion of the procedural requisites; removability is challenged by a motion to remand. *See* 14A WRIGHT ET AL., *supra* note 34, § 3730, at 500; ALI STUDY DRAFT NO. 5, *supra* note 75, at 217 (commentary to § 1381). Presumably to reflect this fact, Congress amended § 1446 in 1988 by substituting the phrase "notice of removal" for "petition for removal." Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1016, 102 Stat. 4642, 4669 (1988). Thus, the practical import of a determination that a mixed case is not removable would be that the district court must remand the entirety of the case for lack of subject matter jurisdiction.

78. 28 U.S.C. § 1447(c) (1988).

79. The one exception is for cases that are removed pursuant to § 1441(c). That provision specifically authorizes a limited degree of remand discretion. *See infra* text accompanying note 103.

80. *See infra* note 191.

Carnegie-Mellon University v. Cohill,[81] the Supreme Court firmly rejected that view. It held that district courts may remand pendent claims after federal question claims have been eliminated notwithstanding that the claims remain within the federal courts' subject matter jurisdiction. However, the potential scope of *Carnegie-Mellon*'s holding remains unclear. Lower courts and commentators differ regarding precisely what circumstances might justify remand.[82] Parts III and IV of this Note will argue that both Supreme Court precedent and the removal statutes, properly construed, entrust the district court with discretion to remand actions to prevent a bifurcated cause of action. The inquiry in those two Parts is predicated, of course, on the conclusion that mixed cases are removable. The following sections examine whether a private defendant may remove a mixed case on the basis of either diversity or federal question jurisdiction.[83]

C. *Mixed-Case Diversity Removal*

A first glance suggests that the mixed-case removal puzzle could arise if, for example, a Michigan resident sues a citizen of Ohio and the state of Indiana on state law claims in Michigan state court.[84] In fact, the Fifth Circuit assumed in *McKay v. Boyd Construction Co.*[85] that the private defendant based his petition for removal on diversity of citizenship between itself and the plaintiff, rather than on the existence of a federal question.[86] It then implicitly posed the question of mixed-case diversity removal: Is an action over which diversity jurisdiction lies removable when the Eleventh Amendment bars one of the claims? This section reveals that the problem of mixed-case diversity removal, as addressed by the *McKay* court, is illusory. Regardless of the Eleventh Amendment, federal diversity jurisdiction cannot lie over an

81. 484 U.S. 343 (1988).

82. *See infra* section III.B.

83. This Note addresses only whether mixed cases are removable pursuant to § 1441(a) and (c). It does not expressly consider, for example, attempts by federal officers to remove cases pursuant to § 1442. The specialized removal provisions outside of § 1441 are discussed only to the extent they shed light on the proper scope of district court remand discretion. *See infra* notes 294-95 and accompanying text.

84. Although the Constitution requires that suits between states be heard in federal court, U.S. CONST. art. III, § 2, no federal law prevents states from hearing suits prosecuted by citizens against other states. *See, e.g.*, Nevada v. Hall, 440 U.S. 410 (1979).

85. 769 F.2d 1084 (5th Cir. 1985).

86. Although the defendant Boyd was a citizen of the state in which McKay sued, and therefore was prevented by § 1441(b) from removing the case on diversity grounds, the court found that McKay waived this defect. 769 F.2d at 1087.

Incidentally, the court's assumption that Boyd intended to ground removal in the district court's diversity jurisdiction was erroneous. Boyd's removal sought to invoke federal question jurisdiction over McKay's claim that the defendants' failure to erect a guardrail as required by federal highway construction regulations constituted negligence per se. Telephone Interview with Lealand Smith, Attorney at Boyd's counsel McCoy, Wilkins, Stephens & Tipton (June 7, 1993).

action to which a state is a party.[87]

It is firmly settled that a suit between a state and a citizen of another state does not support federal diversity jurisdiction "for a State cannot in the nature of things be a citizen of any State."[88] Notwithstanding the certainty that a state cannot *create* diversity of citizenship, the lower federal courts have divided over the question whether the joinder of a state defendant *destroys* complete diversity when diversity holds between the plaintiff and all private defendants.[89] This confusion arises from an ambiguity within the rule of complete diversity.

In its classic statement, the complete diversity rule establishes that diversity jurisdiction is unavailable unless each plaintiff could invoke diversity jurisdiction against each defendant.[90] So stated, the requirement of complete diversity would deny diversity jurisdiction over every case in which a state is a party. However, alternate statements of the rule lead to a different result. If complete diversity requires only that "no plaintiff may be a citizen of the same state as any defend-

87. The discussion that follows assumes that a party shielded by the Eleventh Amendment will also be deemed the state for purposes of diversity jurisdiction. Of course, the converse is not always true, thanks to the rule of *Ex parte Young*. *See supra* notes 32-37 and accompanying text. To be sure, " '[t]he tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them . . . must constantly be guarded against.' " ROGER C. CRAMTON ET AL., CONFLICT OF LAWS 91 (4th ed. 1987) (quoting Moffatt Hancock, *Fallacy of the Transplanted Category*, 37 CAN. B. REV. 535, 575 (1959) (quoting WALTER W. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 159 (1942))). Courts have, however, applied the same "real party in interest" test to determine whether a nominal party is the state for both diversity and Eleventh Amendment purposes. *See, e.g.*, Northeast Fed. Credit Union v. Neves, 837 F.2d 531, 533-34 (1st Cir. 1988); Tradigrain v. Mississippi State Port Auth., 701 F.2d 1131, 1132 (5th Cir. 1983) (observing that the analysis is "virtually identical whether the case involves a determination of immunity under the eleventh amendment or a determination of citizenship for diversity jurisdiction"); Adden v. Middlebrooks, 688 F.2d 1147, 1150 (7th Cir. 1982); Ronwin v. Shapiro, 657 F.2d 1071, 1072-73 (9th Cir. 1981); Ramada Inns, Inc. v. Rosemount Memorial Park Assn., 598 F.2d 1303, 1306 (3d Cir. 1979) ("Whether a particular case involves a question of diversity jurisdiction, or Eleventh Amendment prohibition, the initial inquiry is the same: is the state a real party in interest to the litigation?") (footnotes omitted). For a critique of the application of identical rules in the different contexts, see *Ramada Inns*, 598 F.2d at 1308-11 (Seitz, C.J., concurring).

88. Stone v. South Carolina, 117 U.S. 430, 433 (1886); *see also* State Highway Commn. v. Utah Constr. Co., 278 U.S. 194, 199-200 (1929); Postal Tel. Cable Co. v. Alabama, 155 U.S. 482, 487 (1894).

89. *Compare* Long v. District of Columbia, 820 F.2d 409, 414-17 (D.C. Cir. 1987) *and* McKnight v. Broedell, 212 F. Supp. 45, 47 (E.D. Mich. 1962) ("[A] state is not a citizen of any state and, therefore, if made a party in a diversity action would destroy jurisdiction.") *with* United Pac. Ins. Co. v. Capital Dev. Bd., 482 F. Supp. 541, 546 (N.D. Ill. 1979) ("The joinder of CDB would not contravene [the complete diversity] rule, since CDB . . . is not a citizen for diversity purposes and thus is not a co-citizen of plaintiff United.") *and* Laird v. Chrysler Corp., 92 F.R.D. 473 (D. Mass. 1981) ("Since Rhode Island is not a citizen for diversity purposes, it cannot be a co-citizen of any party and could not destroy the diversity jurisdiction already established.") (citations and footnotes omitted).

90. *See, e.g.*, Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 829 (1989) ("When a plaintiff sues more than one defendant in a diversity action, the plaintiff must meet the requirements of the diversity statute for *each* defendant or face dismissal." (citing Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806))).

ant,"[91] then adding a state defendant would not destroy diversity so long as the other parties are diverse. Because these alternate formulations produce the same result in the ordinary case, the potential tension between the two has apparently gone unnoticed.[92] To resolve the conflict requires examination of the purposes underlying the complete diversity rule.

The original rationale for the complete diversity rule is obscure.[93] Indeed, the rule seems contrary to the purpose underlying the grant of diversity jurisdiction — to protect out-of-state parties from local prejudice.[94] That rationale, logically extended, would dictate that, if a

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91. *E.g.*, Fidelity & Deposit Co. v. Sheboygan Falls, 713 F.2d 1261, 1264 (7th Cir. 1983).

92. For example, in Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978), the Supreme Court apparently endorsed both statements of the rule. *Compare* 437 U.S. at 373 ("[D]iversity jurisdiction does not exist unless *each* defendant is a citizen of a different State from *each* plaintiff.") *with* 437 U.S. at 374 ("[D]iversity jurisdiction is not to be available when any plaintiff is a citizen of the same State as any defendant."). Of course, these formulations are not logically incompatible. The apparent inconsistency arises only because, and to the extent that, the latter statement conventionally implies its converse. Strangely, the *Capital Development Board* court supported its conclusion that the presence of a state party is not diversity-destroying with reference to the much less helpful former statement. *See* 482 F. Supp. at 546.

93. The rule is not a constitutional requirement, *see, e.g.*, State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 530-31 (1967), but rather a product of statutory construction. The Judiciary Act of 1789, enacting the constitutional grant of diversity jurisdiction, was first construed to require complete diversity by Chief Justice Marshall in Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806). Unfortunately, the opinion does not explain the reasons for its interpretation. The conventional assumption is that the Chief Justice reasoned that "the presence of residents of the same state on both sides of the lawsuit neutralizes any bias in favor of residents." National Assn. of Realtors v. National Real Estate Assn., 894 F.2d 937, 941 (7th Cir. 1990); *see also* 1 JUDICIAL CONFERENCE OF THE UNITED STATES, FEDERAL COURTS STUDY COMMITTEE: WORKING PAPERS AND SUBCOMMITTEE REPORTS 540 (1990) [hereinafter STUDY COMMITTEE PAPERS]; David P. Currie, *The Federal Courts and the American Law Institute, Part I*, 36 U. CHI. L. REV. 1, 18 (1968). This theory is problematic because, as Professor Currie acknowledged, it is far too narrow to support the complete diversity rule. It surely stretches credibility to claim that, for instance, the presence of a resident of Ohio as a plaintiff, in a suit filed in Michigan state court by a dozen Michiganders against an Ohioan, will "neutralize" any potential forum bias. Perhaps it was recognition of the illogic of his rule that accounted for Marshall's alleged subsequent regret of his *Strawbridge* opinion. *See* Louisville, C., & C. R.R. v. Letson, 43 U.S. (2 How.) 497, 555-56 (1844).

Then again, perhaps the complete diversity rule rested on other foundations. *See* Richard D. Freer, *A Principled Statutory Approach to Supplemental Jurisdiction*, 1987 DUKE L.J. 34, 41 ("Only some policy, which Congress did not state and which Chief Justice Marshall declined to discuss in *Strawbridge*, could have justified the narrower construction.").

94. *See* 13B WRIGHT ET AL., *supra* note 34, § 3601 nn.14-25. The Supreme Court first articulated this rationale in Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 89 (1809), *overruled on other grounds by* Louisville, C., & C. R.R. v. Letson, 43 U.S. (2 How.) 497, 559 (1844). Since then, several leading scholars have suggested that the Framers' real concern was to protect commercial interests from state courts animated by democratic-agrarian bias. *See, e.g.*, John P. Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROBS. 3, 22-28 (1948); Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 521-22 (1928); *see also* Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 495-99 (1928) (suggesting that the Framers feared the state legislatures' ability to pass debtor relief laws, and generally to control the state courts, rather than direct bias by the state courts themselves). Nonetheless, courts today routinely invoke the local bias rationale. *See, e.g.*, Sadat v. Mertes, 615 F.2d 1176, 1182 (7th Cir. 1980); Risk v. Kingdom of Norway, 707 F. Supp. 1159, 1163 (N.D. Cal. 1989), *aff'd. sub nom.* Risk v. Halvorsen, 936 F.2d 393 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 880 (1992).

plaintiff chooses to prosecute a suit against citizens of different states, an out-of-state defendant should be able either to separate and remove all claims asserted only against herself or to remove the entire case, carrying all defendants from the forum state along to federal court. Commentators have criticized the requirement of complete diversity for frustrating this logical result.[95] Nonetheless, it remains the law. Accordingly, the present need is not to discover the complete diversity rule's historical justification, but to identify the function that it currently serves.[96]

The most reasonable hypothesis is that the complete diversity rule today serves simply to limit diversity jurisdiction.[97] The rule reflects the prevailing judgment of both Congress and the courts that the need to provide a federal forum for every party who might be subjected to local bias is not sufficiently compelling either to justify a bifurcated suit or to afford a federal forum to those parties who lack an independent basis for federal jurisdiction. In recent years, Congress has acted repeatedly to prevent a party with a claim to the federal courts' diversity jurisdiction from securing a federal forum at the expense of either a bifurcated suit or the expansion of federal diversity jurisdiction to embrace nondiverse parties.[98] Similarly, the Supreme Court has approved application of the stringent completeness requirement to alienage jurisdiction, observing in recent dicta that the presence of a "stateless" entity does destroy complete diversity.[99]

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95. Reasoning that local prejudice can be directed against out-of-state defendants joined to an in-state defendant, the American Law Institute proposed that the complete diversity requirement be abolished in "case[s] involving several liability or liability in the alternative." AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, TENTATIVE DRAFT NO. 2, at 87 (1964) (commentary to § 1305); *see also* Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles,"* 78 VA. L. REV. 1769, 1803-06 (1992).

96. *Cf.* CHARLES A. WRIGHT, LAW OF FEDERAL COURTS § 23, at 128-29 (4th ed. 1983) ("The conditions that existed, or were feared to exist, in 1789 are irrelevant in determining the continued necessity for diversity jurisdiction. . . . [T]he decision to retain or abolish such jurisdiction today must depend on the utility of the jurisdiction in today's society.").

97. Diversity jurisdiction has provoked pointed scholarly criticism. For a partial list of contributions to the debate, see WRIGHT, *supra* note 96, at 130 nn.16-17.

98. First, Congress amended § 1441(c) to deny removability if the "separate and independent" claim is based on diversity jurisdiction. *See infra* note 105. Second, in codifying supplemental jurisdiction, Congress agreed with the result in Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978), and specified that original diversity jurisdiction will not support supplemental jurisdiction over nondiverse parties. 28 U.S.C. § 1367(b) (Supp. IV 1992). Two years earlier, Congress effected the same policy in § 1447(e): "If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court." 28 U.S.C. § 1447(e) (1988). The legislative history reveals that Congress considered the "obvious alternative" of also authorizing district courts to permit joinder and retain jurisdiction, but adopted "[t]he more modest approach . . . in order to avoid the opposition that might be encountered by a proposal that would provide a small enlargement of diversity jurisdiction." H.R. REP. NO. 889, 100th Cong., 2d Sess. 73 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5982, 6033-34.

99. Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 829 (1989). The plaintiff in

These facts all indicate that the complete diversity rule is more practical than principled. If there exists a reason to provide a federal forum merely because the two parties to a suit are citizens of different states, that reason does not necessarily disappear upon the addition of a nondiverse litigant. The unavailability of diversity jurisdiction in such cases manifests congressional and judicial intent to fix diversity jurisdiction at its irreducible minimum. This theory controls cases naming both state and private defendants: because a suit against only a state would not support diversity jurisdiction, addition of diverse private defendants cannot create it. Put differently, the first characterization of the complete diversity rule is correct: " 'between . . . citizens of different States' . . . mean[s] citizens of different States and no one else."[100] Because a plaintiff and a state defendant cannot be "citizens of different states," federal courts lack diversity jurisdiction over a case to which a state is a party. Consequently, independent of the operation of the Eleventh Amendment, defendants cannot remove a mixed case on the basis of diversity of citizenship.

D. *Mixed-Case Federal Question Removal*

Given that diversity jurisdiction will not support mixed-case removal, the final question for this Part is whether federal question jurisdiction will. That is, can a mixed case be removed if the claims against the private defendant arise under federal law — as defined by 28 U.S.C. § 1331?[101] This section examines the two avenues by which

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Newman-Green, a citizen of Illinois, had brought a contract action against foreign citizens and Bettison, a U.S. citizen domiciled in Venezuela. The court of appeals raised the question of jurisdiction sua sponte and determined that the presence of defendant Bettison destroyed diversity jurisdiction for two reasons: Bettison's U.S. citizenship destroyed complete alienage jurisdiction under 28 U.S.C. § 1332(a)(2) ("citizens of a State and citizens or subjects of a foreign state"); and his "stateless status" prevented satisfaction of the state-diversity predicate of § 1332(a)(3) ("citizens of different States and in which citizens or subjects of a foreign state are additional parties"). Newman-Green Inc. v. Alfonzo-Larrain, 832 F.2d 417 (7th Cir. 1987) (per Easterbrook, J.), *affd.*, 854 F.2d 916 (1988) (en banc), *revd.*, 490 U.S. 826 (1989). Although federal courts had established that a U.S. citizen domiciled abroad is not a foreign subject for purposes of § 1332(a)(2), *see, e.g.*, Sadat v. Mertes, 615 F.2d 1176, 1183 (7th Cir. 1980), in *Newman-Green*, the Seventh Circuit took the (unnoted) further step of imposing a stringent "complete alienage" condition.

The narrow issue presented on certiorari was whether the court of appeals could dismiss Bettison's complaint pursuant to Rule 21 of the Federal Rules of Civil Procedure in order to produce diversity, or whether it had to remand to the district court for the same purpose. The Supreme Court's statement that a stateless entity destroys complete diversity occurred in passing and without discussion. Nonetheless, if the presence of a stateless U.S. citizen destroys complete alienage jurisdiction, it follows a fortiori that the presence of a state destroys complete diversity jurisdiction. This is so because, although it is seemingly uncontroversial that diversity jurisdiction should not lie over an action between a state and a citizen of another state, common sense suggests that a case between a state citizen and a U.S. citizen domiciled abroad should support diversity jurisdiction. *See* Meyers v. Smith, 460 F. Supp. 621, 624 (D.D.C. 1978) (calling the treatment of nonresident U.S. citizens a "loophole in 28 U.S.C. § 1332"); Currie, *supra* note 93, at 9-10.

100. Finley v. United States, 490 U.S. 547, 552 (1989).

101. For purposes of this Part it makes no difference whether the claims against the state

defendants might remove a case containing federal question claims — sections 1441(a) and 1441(c).

Section 1441(a) provides for removal of "any civil action brought in a State court of which the district courts of the United States have original jurisdiction."[102] Accordingly, it would seem that a mixed case is removable pursuant to section 1441(a) if the presence of a federal question claim confers original jurisdiction over a civil action notwithstanding the joinder of a state defendant. Section 1441(c) provides:

> Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may . . . remand all matters in which State law predominates.[103]

Unlike section 1441(a), which discusses *civil actions,* section 1441(c) speaks explicitly of removable and nonremovable *claims.* By rendering it unnecessary to determine whether there is original jurisdiction over a *case* containing a barred *claim,* section 1441(c) provides an analytically simpler introduction to mixed-case removal.

1. *Removal of "Separate and Independent" Claims*

Consider a hypothetical case brought in state court consisting of two separate and independent claims, *A* and *B.* By the express terms of section 1441(c), if claim *A* falls within original federal question jurisdiction, and claim *B* does not, the defendant can remove *the entire case.* Section 1441(c) further provides that, after the case has been removed, the district court has discretion to hear or remand "all matters in which State law predominates." The mixed-case wrinkle arises when claim *B* — whether a state or federal claim — is barred by the Eleventh Amendment. Supreme Court precedent flatly forbids federal courts from hearing claim *B.*[104] Thus, for purposes of section 1441(c), the only difference between a mixed case and a civil action consisting of separate and independent claims, none of which implicate the Eleventh Amendment is that in the former event the district court may *not* "determine all issues therein." When a defendant removes a civil action in which a federal question claim is joined to a separate and independent claim barred by the Eleventh Amendment, the dis-

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defendant arise under state or federal law or whether the private defendant faces claims arising under state law in addition to the federal question claims. *See infra* note 119. This Note does not, however, advocate federal question removal of mixed cases in which the only federal causes of action name state defendants. *See infra* note 151.

102. *See supra* text accompanying note 65.

103. 28 U.S.C. § 1441(c) (Supp. IV 1992).

104. *See supra* notes 49-52 and accompanying text.

trict court must, therefore, (a) allow removal of the entire *action;* and (b) remand the barred *claim.*

The *McKay* court adopted this analysis when it asserted that *if* section 1441(c) applied,[105] then the private defendant "could secure removal of the case against it"[106] despite the presence of a barred claim. However, the court rightly found that section 1441(c) did *not* apply because the claims arose from an "interlocked series of transactions" and were not therefore "separate and independent."[107] The district courts in the Ninth Circuit that followed *McKay* reached the same result.[108] Two conclusions follow. On one hand, a defendant can remove a mixed case when a barred claim is separate and independent from a nonbarred federal question claim. At this point, the district court must remand the barred claims and hear all nonbarred federal question claims. On the other hand, the likelihood that the claims will in fact be "separate and independent" is sure to be small.[109]

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105. At the time of *McKay,* § 1441(c) read as follows:

> Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

28 U.S.C. § 1441(c) (1988). The 1990 amendment makes two changes: (1) the independent claim is no longer removable on diversity grounds; and (2) the district court now has discretion to remand some claims that technically fall within its original jurisdiction. Judicial Improvements Act of 1990, Pub. L. 101-650, § 312, 104 Stat. 5089, 5114. These changes do not affect the analysis of this section. Both changes are, however, relevant to this Note. *See supra* note 98 and accompanying text; *infra* notes 284-86 and accompanying text.

106. McKay v. Boyd Constr. Co., 769 F.2d 1084, 1087 (5th Cir. 1985). It appears that the court is using the word *case* colloquially. Of course, the "case" against the state defendant could still not be heard by the district court.

107. " '[W]here there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action under § 1441(c).' " 769 F.2d at 1087 (quoting American Fire & Cas. Co. v. Finn, 341 U.S. 6, 14 (1951)).

Before the 1948 revision of the Judicial Code, the presence in a larger lawsuit of a single "controversy which is wholly between citizens of different States, and which can be fully determined as between them" allowed the defendants to that controversy to remove the entire action. 28 U.S.C. § 71 (1946). The Supreme Court crafted its restrictive "separate and independent" test in *Finn* to comport with supposed congressional intent to limit the availability of removal. *Finn,* 341 U.S. at 9-12. For an argument that Congress did not intend to restrict removal of what had been termed "separable controversies," see Arthur J. Keeffe et al., *Venue and Removal Jokers in the New Federal Judicial Code,* 38 VA. L. REV. 569, 598-612 (1952).

108. *See* Simmons v. California, 740 F. Supp. 781, 788-89 (E.D. Cal. 1990); Kelly v. California, 687 F. Supp. 1494, 1496 (D. Nev. 1988), *aff'd.,* 880 F.2d 416 (9th Cir. 1989) (both agreeing that removal of the nonbarred claim would be proper if the claims were separate and independent, but also finding that, in fact, the claims were intertwined).

109. Indeed, several commentators have speculated that, in practice, the supplemental jurisdiction statute, 28 U.S.C. § 1367, will render § 1441(c) moot. *See, e.g.,* David D. Siegel, *Commentary on 1990 Revision, in* 28 U.S.C.A. § 1441, at 5-6 (West Supp. 1993) (observing that if a claim is not supplemental to a federal question claim under 28 U.S.C. § 1367 and thus not removable under § 1441(a), but is "separate and independent" for purposes of § 1441(c), it is likely not to be part of a single constitutional case). For the text of § 1367, see *infra* text accompanying note 268.

2. *Removal Pursuant to Section 1441(a)*

The more difficult — and contested — issue is whether a mixed case is removable pursuant to section 1441(a), which provides for removal of any "civil action" of which the federal district courts have original jurisdiction. This section proceeds in several steps. First, it introduces the facts of the two leading cases, *McKay v. Boyd Construction Co.*,[110] and *Henry v. Metropolitan Sewer District.*[111] It then pursues *Henry*'s characterization of the pivotal legal dispute — whether the Eleventh Amendment bars claims or cases — and concludes that *Henry* is right and *McKay* wrong. This section proceeds to note, however, that *McKay* need not be read simply as misconstruing Supreme Court precedent. Consequently this section teases from *McKay* and its progeny a way of analyzing the problem that *Henry* entirely overlooks: the *McKay* line of cases can be read to indicate that the Eleventh Amendment's *operation* upon *claims* forecloses a finding that *jurisdiction* lies over the mixed *case,* and thereby prevents removal. This section critiques and rejects this latter approach. It concludes that, regardless of the *McKay* court's intended reasoning, its holding is not salvageable. Mixed cases are removable.

The plaintiff in *McKay v. Boyd Construction Co.* brought a damages action in state court against the Mississippi State Highway Department and a private contractor, alleging negligent construction of a bridge abutment. The district court in *McKay* had granted defendants' removal petition, dismissed the claims against the highway department as barred by the Eleventh Amendment, and granted summary judgment for the private contractor.[112] On appeal, the Fifth Circuit ordered the entire action remanded to the state court, holding nonremovable any suit containing barred claims:

> The decision of the district court must be vacated because this suit does not fall within the limited jurisdiction of the district court. . . . [Section 1441] only authorizes the removal of actions that are within the original jurisdiction of the district court. Because a state agency is a defendant, the eleventh amendment bars the exercise of federal jurisdiction here.
>
> . . . .
>
> The eleventh amendment denies courts of the United States jurisdiction over any action wherein a state or a state agency or department is named as defendant.[113]

110. 769 F.2d 1084 (5th Cir. 1985).

111. 922 F.2d 332 (6th Cir. 1990).

112. 769 F.2d at 1086.

113. 769 F.2d at 1086 (citation omitted). The Fifth Circuit assumed that the defendants invoked the district court's diversity jurisdiction. However, the court's reasoning — that any suit that names a state agency as a defendant "does not fall within the limited jurisdiction of the district court," 769 F.2d at 1086, and is therefore nonremovable — would apply in precisely the same way to removal petitions predicated on federal question jurisdiction.

In *Henry v. Metropolitan Sewer District*,[114] the Sixth Circuit expressly repudiated the holding and reasoning of *McKay*. In *Henry* a discharged state employee had filed federal and state law claims in Kentucky state court against, among others, a Kentucky agency and state officers in both their individual and official capacities. After defendants removed the case,[115] the federal district court held that the Eleventh Amendment barred the claims against the state agency and the named individuals in their official capacities, and it dismissed them without prejudice. It then addressed the section 1983 individual capacity claims on the merits and held that the defendants' qualified immunity insulated them from liability. Finally, it remanded the pendent state law claims to the state court from which the case had been removed. On appeal, the plaintiff argued that the Eleventh Amendment's application to individual claims divested the district court of subject matter jurisdiction over the action, thereby rendering removal improvident.[116]

The Sixth Circuit rejected this contention. It held that the action was removable, that the district court could not adjudicate the claims against the state defendants,[117] and that the district court properly considered the nonbarred claims on the merits. In reaching this conclusion, the *Henry* court implicitly determined that the Eleventh Amendment has no bearing on the propriety of removal.[118] Because Henry's suit contained a claim arising under federal law — as, by definition, do all mixed federal question cases — the civil action was removable.[119] The Sixth Circuit then framed the question that divided it

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114. 922 F.2d 332 (6th Cir. 1990).

115. Although the opinion is silent on the question, the defendants must have invoked § 1441(a).

116. 922 F.2d at 335.

117. The court agreed with the plaintiff that the barred claims should have been remanded rather than dismissed. 922 F.2d at 337-38.

118. In response to plaintiff's argument that "the jurisdictional bar of the eleventh amendment . . . stripped the district court of jurisdiction, thereby rendering removal [of the entire case] improvident," the court concluded "that the eleventh amendment's jurisdictional bar did not divest the district court of subject matter jurisdiction over the plaintiff's individual capacity claim." 922 F.2d at 338. Significantly, the court never addressed the argument that *the case* was not properly *removed;* it only decided that, because the district court does have jurisdiction over the nonbarred *claims,* it need not *remand* them.

The conclusion that, strictly speaking, the Eleventh Amendment is irrelevant to the propriety of mixed-case removal is bolstered by the opinions of other courts that have dealt with removed mixed cases. Panels in both the Fifth and Sixth Circuits have remanded individual barred claims without even contemplating that the presence of those claims might have rendered removal of the action improper. *See, e.g.,* Hays County Guardian v. Supple, 969 F.2d 111 (5th Cir. 1992), *cert. denied,* 113 S. Ct. 1067 (1993); Gwinn Area Community Sch. v. Michigan, 741 F.2d 840 (6th Cir. 1984).

119. Supplemental state law claims are removable as well. Section 1367(a) of Title 28, granting supplemental jurisdiction to the federal courts, provides in relevant part: "[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that . . . form part of the same case or controversy." 28 U.S.C. § 1367(a) (Supp. IV 1992). Section 1441(a) provides for removal of "civil action[s] . . . of

from the Fifth Circuit in simple terms: Does the Eleventh Amendment merely bar individual claims against the state or does it foreclose federal jurisdiction over the entirety of cases that include such claims?

The Fifth Circuit's *McKay* opinion, although somewhat opaque, appears to base its holding that mixed cases are not removable on its belief that the Eleventh Amendment applies to cases, not claims. Citing *Pennhurst,* the court asserted that the Amendment bars *cases:* "The eleventh amendment denies courts of the United States jurisdiction over *any action* wherein a state or a state agency or department is named as defendant."[120] Within five years of the Fifth Circuit's opinion, three district courts in the Ninth Circuit, two citing *McKay,* likewise held that any case containing a claim barred by the Eleventh Amendment is not removable. Most significantly, *McKay*'s Ninth Circuit progeny appear to adopt the same fuzzy reasoning. Acknowledging that removal jurisdiction follows original jurisdiction, they merely assert that the presence of a claim against the state bars the exercise of original jurisdiction over the entire case.[121]

Reading *McKay* in this way, the Sixth Circuit in *Henry* fortified its conclusion that mixed cases are removable simply by demonstrating that *McKay* was wrong under settled law. The *Henry* court first observed that the Supreme Court, in *Alabama v. Pugh,*[122] had dismissed claims brought against a state and its officials in their official capaci-

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which the district courts . . . have original jurisdiction." 28 U.S.C. § 1441(a) (1988). Thus, in establishing that a district court has original jurisdiction over a civil action that contains supplemental claims, § 1367 ensures that such an action is removable. *See also* H.R. REP. NO. 734, 101st Cong., 2d Sess. 23 (1990) (expressing congressional intent that civil actions containing supplemental claims would be removable).

120. 769 F.2d 1084, 1086 (5th Cir. 1985) (citing Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100 (1984)) (emphasis added).

121. Unfortunately, the conclusory nature of these opinions precludes a confident understanding of the courts' logic. Two cases arose when private individuals sued the states of Nevada and California, and the Tahoe Regional Planning Agency (TRPA), in Nevada state court, alleging, inter alia, that the TRPA's zoning regulations constituted a taking for which the plaintiffs were entitled to compensation under the Fifth and Fourteenth Amendments. In both cases, defendants removed and plaintiffs moved to remand. In Stephans v. Nevada, 685 F. Supp. 217 (D. Nev. 1988), the court declared that "[p]ursuant to the Eleventh Amendment . . . this Court is without jurisdiction over the present case as long as the State of Nevada is a defendant." 685 F. Supp. at 219. Nonetheless, the court did allow removal and heard the nonbarred claims after employing the doctrine of fraudulent joinder to dismiss the state as a defendant. 685 F. Supp. at 219-20. Denying removability in Kelly v. California, 687 F. Supp. 1494 (D. Nev. 1988), *affd.,* 880 F.2d 416 (9th Cir. 1989), the court asserted as a basic principle that "[i]f the action in the state court is against parties with respect to whom the federal court cannot exercise jurisdiction, the action is not removable." 687 F. Supp. at 1495.

In Simmons v. California, 740 F. Supp. 781, 785 (E.D. Cal. 1990), a civil rights action similar to *Henry,* the court announced that "it is clear that, at least in the absence of a waiver, a federal court does not have the power to entertain suits governed by the provisions of the Eleventh Amendment." It proceeded to affirm the conclusion in *McKay* that "[b]ecause a state agency is a defendant, the eleventh amendment bars the exercise of federal jurisdiction here." 740 F. Supp. at 785 (citing *McKay,* 769 F.2d at 1086).

122. 438 U.S. 781 (1978).

ties, while upholding federal court judgments against those same officials in their individual capacities.[123] The Sixth Circuit then recited *Pennhurst*'s articulation of settled law: " 'A federal court must examine *each claim* in a case to see if the court's *jurisdiction over that claim* is barred by the Eleventh Amendment.' "[124] Concluding that "both the Supreme Court and the United States courts of appeals have addressed the merits of claims unaffected by the eleventh amendment despite the presence of barred claims,"[125] *Henry* explicitly rejected *McKay*'s holding that mixed cases are not removable.[126]

Henry is surely correct that, pursuant to Supreme Court precedent, "the eleventh amendment apparently presents a jurisdictional bar to claims, not to entire cases which involve claims implicating the eleventh amendment."[127] It is tempting therefore to adopt the Sixth Circuit's own characterization of the split between itself and the Fifth Circuit, repudiating *McKay* on account of its mistaken reading of the Supreme Court's opinion in *Pennhurst*.[128] While the *McKay* opinion on its face warrants such a criticism, the conclusion that four federal courts simply misread nearly crystalline Supreme Court precedent invites skepticism.[129] Accordingly, the remainder of this section pieces together elements of the four opinions that found mixed cases nonremovable in an effort to construct a better argument for that holding.[130]

The most striking feature of the *McKay* opinion — other than its

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123. Henry v. Metropolitan Sewer Dist., 922 F.2d 332, 337 (6th Cir. 1990).

124. 922 F.2d at 337 (quoting *Pennhurst II*, 465 U.S. at 121) (emphasis in *Henry*).

125. 922 F.2d at 338.

126. "To the extent that *McKay* forecloses consideration of claims unaffected by the eleventh amendment in favor of remand pursuant to 28 U.S.C. § 1447(c), we reject its analysis as fundamentally incompatible with *Pugh* and *Pennhurst II*." 922 F.2d at 339.

127. 922 F.2d at 337.

128. Superficially, the argument in *McKay* would actually seem more plausible had the court invoked the text of the Eleventh Amendment rather than *Pennhurst* as authority for the proposition that "the eleventh amendment denies courts of the United States jurisdiction over any action wherein a state . . . is named as a defendant." 769 F.2d at 1086; *see also supra* note 120 and accompanying text. In other words, the Fifth Circuit could have argued that *Pennhurst* and its predecessors are wrong: if a plaintiff files suit in federal court and any single claim is barred by the Eleventh Amendment, the federal courts are barred from hearing the entire case. This argument also must fail.

Although by its express language, the Eleventh Amendment bar encompasses "any *suit* in law or equity," U.S. CONST. amend. XI (emphasis added), it is rather late in the day for an argument for faithful adherence to the Eleventh Amendment text. *See supra* note 4. Moreover, the contours of a "suit" have evolved markedly during the two centuries since the Eleventh Amendment's adoption. *See supra* text accompanying notes 49-50.

129. In cases where the plaintiff originally files a mixed case in federal court, courts seem to have no trouble recognizing that the Eleventh Amendment operates only against individual claims. *See, e.g.*, Davis v. Department of Soc. Servs., 941 F.2d 1206 (4th Cir.) (opinion at No. 90-1864, 1991 WL 157258 (Aug. 19, 1991)); Mosley v. Hairston, 920 F.2d 409 (6th Cir. 1990).

130. The implication is not that the argument that follows is "really" what the courts in question intended. The two important points are, first, that the opinions are so muddled that it is unclear just what the courts did intend and, second, that the opinions do contain at least the kernel of an argument that is worth considering.

apparent misreading of *Pennhurst* — is that it fails to distinguish between the absence of subject matter jurisdiction and a bar to the exercise of such jurisdiction.[131] A court may have "original jurisdiction" pursuant to section 1331, yet any one of a number of factors may prevent the court from deciding the case — for example, the statute of limitations, failure to exhaust state or administrative remedies, or the Eleventh Amendment. In such event, the court lacks "jurisdiction" in the sense of adjudicative power.[132] The approach employed by the *Henry* court supports a sharp analytical distinction between the question of whether the action is removable and the scope of the Eleventh Amendment bar. In contrast, the *McKay* court intermingled the two inquiries. It suggested that removal is permissible only if the district court would ultimately have power to adjudicate the action.[133] After determining that a *claim* was barred, the court concluded that it could not adjudicate the entire mixed case.[134] Because the purpose of section 1441(a) — in contradistinction to section 1441(c) — is to remove entire actions, the court held the case nonremovable.[135] Schematically, then, the reasoning of the *McKay* line of cases can be parsed as follows: (1) a civil action is removable only if it could be heard in federal court; (2) if the Eleventh Amendment bars some *claims,* a federal district court cannot hear the action in its entirety; (3) section 1441(a) does not allow removal of *parts* of cases; therefore (4) the action is nonremovable.[136]

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131. In rapid succession, the opinion states both that the case "does not fall within the limited jurisdiction of the district court" and that "the eleventh amendment bars the exercise of federal jurisdiction" over the case. 769 F.2d at 1086.

132. *See, e.g.,* Crowell v. Benson, 285 U.S. 22, 85 (1932) (Brandeis, J., dissenting).

133. The clear import of the *McKay* court's observation that § 1441 "only authorizes the removal of actions that are within the original jurisdiction of the district court," 769 F.2d at 1086, is that the presence of a barred claim forecloses original jurisdiction. The use of the phrase "original jurisdiction" is misleading. Consistent with the analysis proposed in this Note, this phrase should be understood in context not as a reference to the "original jurisdiction statutes," §§ 1331-1332, but rather to the bottom-line determination of whether the federal district courts would have power to adjudicate the entire civil action had it been originally filed there by the plaintiff.

134. 769 F.2d at 1087.

135. At least one of the district courts was surely reasoning along these lines:

> Although 28 U.S.C. § 1441 does not define the phrase "civil action," common sense suggests it is the action which was filed in the state court. . . . [T]he phrase "civil action" in the statute "denotes the entirety of the proceedings in question, not merely" claims or parties. . . . [T]he removal statute does not countenance the removal of bits and pieces of cases.

Simmons v. California, 740 F. Supp. 781, 785-86 (E.D. Cal. 1990) (quoting Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371, 1376 (5th Cir. 1980)). In this regard, § 1441(a) stands in revealing contrast to particular removal grants in addition to § 1441(c). *See, e.g.,* 28 U.S.C. § 1452(a) (1988) (authorizing removal to the district courts of "any claim or cause of action in a civil action" if such claim or cause of action relates to bankruptcy).

136. This second reading of *McKay* possesses an obvious virtue. If the term "original jurisdiction" has a different meaning in § 1441(a) than it does in § 1331, *McKay* could be reconciled with those cases originally filed in federal court in which the district court properly applied the Eleventh Amendment to dismiss particular claims while adjudicating nonbarred claims on the merits. *See supra* notes 122-25 and accompanying text; *supra* note 129.

There are two problems with this reasoning, for neither step (1) nor step (3) can withstand scrutiny.[137] The greater objection lies against the first step: there is simply no warrant for reading the removal statute to direct the district court to resolve all jurisdictional questions before it grants removal. By its express terms, section 1441 conditions removal upon the district court's "original jurisdiction," leading the Supreme Court and commentators to assume that section 1441 serves only to direct the inquiry to the particular original jurisdiction statutes.[138] Moreover, there are practical reasons for preserving the distinction between lack of subject matter jurisdiction and a bar to the exercise of that jurisdiction. Most notably, a state defendant can waive the Eleventh Amendment bar,[139] whereas parties cannot waive the absence of subject matter jurisdiction.[140] Accordingly, a heavy burden rests on courts and litigants who would wish to read "original" out of section 1441(a).[141]

Rote invocation of the maxim that courts should construe the removal statutes narrowly to comport with congressional intent to limit removal[142] will not suffice. No evidence suggests that Congress in-

137. Lest the reader suspect that the reconstituted argument for *McKay* is a weakly contrived strawman, it should be noted that similar arguments have been advanced by other litigants. For example, an amicus curiae brief filed by 18 states in *Carnegie-Mellon University v. Cohill* argued that when a federal question claim is joined to a pendent state law claim, *neither* is removable under § 1441(a). *See* Joan Steinman, *Removal, Remand, and Review in Pendent Claim and Pendent Party Cases,* 41 VAND. L. REV. 923, 932 (1988) (citing Amicus Curiae Brief of States of Alabama, Alaska, Arkansas, California, Hawaii, Idaho, Indiana, Kentucky, Louisiana, Nevada, New Mexico, Ohio, South Dakota, Tennessee, Texas, Utah, Washington, and Wisconsin in Support of Respondents at 4-16, Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343 (1988) (No. 86-1021)).

Amici reasoned that § 1441(c) alone affords defendants the right to remove cases involving both removable and nonremovable claims. If the two claims are not "separate and independent" — and pendent claims, by definition, are not — there is no statutory basis for removal. Worse, to allow removal would effectively nullify § 1441(c). This argument is even less tenable than would be the comparable argument against mixed-case removal because, under the doctrine of pendent jurisdiction, the entire case in *Carnegie-Mellon* was within the federal courts' jurisdiction. Consequently, the Court held the case removable, as "both the Court's majority and the dissenters responded to the arguments of the amicus curiae with a deafening silence." Steinman, *supra,* at 938.

138. *See, e.g.,* Franchise Tax Bd. v. Laborers Vacation Trust, 463 U.S. 1, 8 (1983) ("[P]ropriety of removal turns on whether the case falls within the original 'federal question' jurisdiction of the United States district courts."); Grubbs v. General Elec. Credit Corp., 405 U.S. 699, 702 (1972); *see also* Steinman, *supra* note 137, at 928 n.29.

139. *See, e.g.,* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 (1985); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99 (1984).

140. *See, e.g.,* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 377 n.21 (1978); American Fire & Cas. Co. v. Finn, 341 U.S. 6, 17-18 (1951).

141. It is not reasonable to assume that § 1441(a) uses the word *jurisdiction* in the sense of "power to adjudicate" and employs the qualifier "original" merely in contrast to "appellate." The statute speaks only of the federal *district* courts, which do not exercise appellate jurisdiction.

142. *See, e.g.,* Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108 (1941). Although federal courts repeat this maxim frequently, *see, e.g.,* Somlyo v. J. Lu-Rob Enters., 932 F.2d 1043, 1045-46 (2d Cir. 1991); York v. Horizon Fed. Sav. & Loan Assn., 712 F. Supp. 85, 87 (E.D. La. 1989); Dorfman v. E.R. Squibb & Sons, Inc., 617 F. Supp. 496, 501 (E.D. Pa. 1985), the proper scope of its application is narrow. *Cf.* Steinman, *supra* note 137, at 936 ("This pre-

tended to enable plaintiffs to foreclose federal question removal merely by joining a claim barred by the Eleventh Amendment. On the contrary, a district court should read section 1441(a) as its plain meaning warrants and grant removal of a mixed case if it lies within the district courts' original jurisdiction.

Even if section 1441(a) were read to condition removal upon a district court's determination that it could exercise its adjudicatory power unimpeded, step (3) in the *McKay* reasoning could not be maintained. Common sense and the recent turbulent history of supplemental jurisdiction suggest that, in unusual circumstances, section 1441(a) does allow removal of *parts* of cases. A revealing analogue arises from the treatment of pendent party removal by the circuits that, prior to Congress's enactment of section 1367, construed the statutory regime to preclude pendent party jurisdiction.

As Professor Joan Steinman has recounted,[143] both a panel of the First Circuit[144] and a district court within the Ninth Circuit[145] expressly considered whether they were obligated to remand the entire removed case on the grounds that original jurisdiction does not embrace civil actions containing pendent party claims. Unlike in *Carnegie-Mellon,* the federal courts could not permit removal of the entire civil action.[146] Therefore, the argument for holding the case nonremovable and remanding all claims seemed strong: "Arguably, just as no partial removals are authorized, no partial remands — creating the same results — should be permitted."[147]

In contrast to the reconstituted reasoning of *McKay,* both the First Circuit and the district court bowed to countervailing policy considerations — principally that plaintiffs not be able to use permissive joinder rules to foreclose defendants' right to remove federal question claims — in choosing to remand only the pendent party claims and hear the federal question claims.[148] Even Steinman, an avowed strict interpreter of the removal statute,[149] supports these results, reiterating

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scription . . . is really just a corollary of the doctrine that federal courts always ought to narrowly construe their subject matter jurisdiction."). *Shamrock Oil* advises that federal courts should err against finding federal jurisdiction when applying established doctrine to removed cases; it should not be read as authorizing courts to craft new rules in the removal context for determining whether a jurisdictional provision is satisfied.

143. Steinman, *supra* note 137, at 979-82.

144. Charles D. Bonanno Linen Serv., Inc. v. McCarthy, 708 F.2d 1 (1st Cir.), *cert. denied,* 464 U.S. 936 (1983).

145. Adolph Coors Co. v. Sickler, 608 F. Supp. 1417 (C.D. Cal. 1985).

146. Contrast the argument by *Carnegie-Mellon* amicus curiae as outlined by Steinman, *supra* note 137.

147. Steinman, *supra* note 137, at 985.

148. *Bonanno,* 708 F.2d at 10-11; *Coors,* 608 F. Supp. at 1426-27. This is the crux of the difference between holding that a mixed case is not removable and holding that it is removable but that the district court has discretion to return the entire case to the state court. The issue is whether plaintiffs or federal judges decide if the private defendants can secure a federal forum.

149. *See infra* note 213.

the concern that defendants' removal rights not be frustrated and emphasizing "Congress' intention to grant removal jurisdiction over the same class or universe of cases as falls within original federal jurisdiction."[150]

These considerations serve to undermine the third step in the argument that mixed cases are not removable. Even if a court were to apply the Eleventh Amendment before assessing removability, it need not conclude that the mixed case is wholly nonremovable. Notwithstanding that section 1441(a) generally contemplates removal of entire cases, such a court should allow removal of the claims over which it can exercise jurisdiction.

In sum, however reconstructed, the reasoning of *McKay* is unsupportable. *Henry* concluded rightly that defendants may remove mixed cases pursuant to section 1441(a) if and only if the case falls within the district courts' original jurisdiction. The Eleventh Amendment simply does not bear on the initial question of removability.[151]

In our federal system, the national government is supreme over the states. Within this hierarchy, the Eleventh Amendment embodies a courtesy due to state sovereignty when state — and not national — interests are particularly affected. If this constitutionalized comity were to prevent federal courts from entertaining matters concerning federal law and *not* implicating state sovereignty, the Eleventh Amendment "would turn federalism on its head."[152] That is, an Amendment designed to accord limited deference to state sovereignty would become a vehicle for effectively usurping federal sovereignty.[153] Rather, the essential step is to determine whether the substance of the claims or the citizenship of the parties supports original jurisdiction. Because any action that contains a barred claim necessarily fails the test for complete diversity, mixed cases are removable only on the basis of a federal question. The Eleventh Amendment becomes relevant only after a section 1441(a) removal has been effected.

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150. Steinman, *supra* note 137, at 986-87. *But see* Gibson v. City of Glendale Police Dept., 786 F. Supp. 1452 (E.D. Wis. 1992).

151. This approach admittedly yields a peculiar situation if the action consists solely of federal law claims against the state defendants and state law claims against the private defendants. The entire action is removable. *See supra* note 119. However, the Eleventh Amendment bars the district court from exercising jurisdiction over any of the federal question claims. The end result could then be that the federal court adjudicates the claims arising under state law and the state court adjudicates the claims arising under federal law. This theoretic possibility should not be too troubling because § 1367 grants the district court discretion to remand the state law claims. Presumably, a decision not to remand the claims would constitute abuse of discretion.

152. Steffel v. Thompson, 415 U.S. 452, 472 (1974).

153. *Cf.* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 407 (1821) (holding that the Eleventh Amendment does not bar Supreme Court review of state court decisions, and reasoning that the Amendment could not have been intended to "so chang[e] the relations between the whole and its parts, as to strip the [national] government of the means of protecting, by the instrumentality of its Courts, the constitution and laws from active violation").

II. Disposing of the Properly Removed Mixed Case

Once a district court has determined that a mixed case is properly removed it must apply the Eleventh Amendment to the constitutive claims. The remainder of this Note considers whether the court should and can remand rather than hear the nonbarred claims. A question of subordinate intrigue, but analytic priority, is whether the court should remand or dismiss without prejudice the claims that it cannot entertain.[154]

If the only grounds for remand are those specified in section 1447(c) — lack of subject matter jurisdiction and procedural defect — then the court must dismiss rather than remand the barred claims. The inconvenient and dilatory consequence of such a rule is that a plaintiff who files a mixed case in state court must, after defendants remove the action and the federal court dismisses the claims against the state, refile those claims in the very court whose jurisdiction she initially invoked. Worse, in states without a savings statute, the plaintiff risks losing her barred claims to the statute of limitations.[155] Sensibly, the Sixth Circuit in *Henry,* while failing even to consider the wisdom or possibility of remanding the nonbarred claims, did order the district court to remand rather than dismiss the claims that the Eleventh Amendment prevented it from adjudicating.[156] This ruling was consistent with Supreme Court precedent. Lower courts generally read *Carnegie-Mellon University v. Cohill*[157] to establish that the district courts' authority to remand removed claims is coterminous with their power to dismiss claims originally filed in federal court.[158]

Recognition that the district court should remand the barred claims of a removed mixed case crystallizes the fact that if the district court proceeds with the nonbarred claims it does so at the likely expense of a bifurcated cause of action. To determine whether the tradeoff is systemically desirable, this Part examines the relevant policy considerations that would favor either maintaining a single suit in state court or bifurcating the case to exercise federal jurisdiction over the nonbarred claims. Section II.A observes that the provision of federal question jurisdiction rests upon Congress's assumption that fed-

154. This preliminary question would be avoided in the unlikely event that a court were partially to follow the reconstituted reasoning of *McKay,* holding that only the nonbarred claims are removable. *See supra* text accompanying notes 143-51.

155. *See* Carnegie-Mellon Univ. v. Cohill, 41 Fair Empl. Prac. Cas. (BNA) 1046, 1053 (3d Cir.) (Stapleton, J., dissenting) ("Removed cases frequently remain pending in the federal court well past the limitations deadline."), *vacated,* 45 Fair Empl. Prac. Cas. (BNA) 1163 (3d Cir. 1986), *aff'd.,* 484 U.S. 343 (1988).

156. Henry v. Metropolitan Sewer Dist., 922 F.2d 332, 337-38 (6th Cir. 1990) (citing Gwinn Area Community Sch. v. Michigan, 741 F.2d 840 (6th Cir. 1984)); *see also* Behre v. United States, 659 F. Supp. 747, 751 (D.N.H. 1987) (remanding rather than dismissing barred claims).

157. 484 U.S. 343 (1988).

158. *See infra* section III.B.2.

eral judges will interpret and apply federal law more faithfully than will their state counterparts. Section II.B proposes that the major considerations favoring remand are the pragmatic and equitable ones of judicial economy and fairness to the parties. Because the weight of these incommensurable factors will vary from case to case, this Part concludes that only exercise of district court remand discretion can effectively balance the competing interests.[159]

A. *Reasons To Exercise Federal Jurisdiction*

The Constitution provides that "[t]he Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States,"[160] but leaves it to Congress to establish both the lower courts[161] and their jurisdiction.[162] In the Judiciary Act of 1789 Congress did create lower courts and assigned them original diversity jurisdiction.[163] While it may seem intuitive that federal courts should be empowered to hear cases involving federal law, Congress did not authorize original federal question jurisdiction until after the Civil War.[164] The rationale at the time was that southern state courts would not protect new federal rights.[165] Today, one would expect that original federal question jurisdiction must be justified upon different grounds.

Scholars generally agree that original jurisdiction is valuable to the extent that federal courts are more likely than state courts to render the "better" verdict.[166] The supposed superiority of federal courts

159. The discussion that follows assumes that the state defendant is not an indispensable party, within the meaning of FED. R. CIV. P. 19, to the dispute between the plaintiff and the private defendants. If a district court determines that the presence of a party over whom it cannot exercise jurisdiction is essential to the just resolution of the claims before it, it should dismiss — or, in this situation, remand — the action without prejudice. *See, e.g.*, Ainsworth Aristocrat Intl. Pty. Ltd. v. Tourism Co., 818 F.2d 1034, 1035 (1st Cir. 1987) (apparently agreeing with the district court that if a state defendant is an indispensable party, the entire action must be dismissed); Lovell v. One Bancorp, 690 F. Supp. 1090, 1104 (D. Me. 1988).

160. U.S. CONST. art. III, § 2, cl. 1.

161. U.S. CONST. art. III, § 1.

162. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

163. Ch. 20, §§ 2-4, 11, 1 Stat. 73-75, 78 (1789).

164. Judiciary Act of 1875, ch. 137, § 1, 18 Stat. 470, 470. Actually, federal question jurisdiction had existed once before. As part of the Federalists' attempt to retain control of the federal judiciary in the lame-duck days of the Adams administration, Congress granted original and removal federal question jurisdiction in the Judiciary Act of 1801. Ch. 4, § 11, 2 Stat. 89, 92. It was repealed the following year. Act of Mar. 8, 1802, ch. 8, 2 Stat. 132.

165. *See, e.g.*, Mitchum v. Foster, 407 U.S. 225, 238-42 & n.28 (1972); REDISH, *supra* note 34, at 2. Tocqueville anticipated the need for original federal question jurisdiction decades earlier. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 140 (J.P. Mayer ed. & George Lawrence trans., 1969) ("[E]ach state is not only foreign to the Union at large but is its perpetual adversary, since whatever authority the Union loses turns to the advantage of the states. Thus, to make the state courts enforce the laws of the Union would be handing the nation over to judges who are prejudiced as well as foreign.").

166. *See, e.g.*, David P. Currie, *Res Judicata: The Neglected Defense*, 45 U. CHI. L. REV.

rests upon four common explanations.[167] Federal judges are considered: (1) more competent than state judges; (2) more expert in, and accustomed to, federal law; (3) less susceptible to political pressures and correspondingly more sympathetic to federal rights and interests;[168] and (4) more likely to produce a uniform and coherent body of federal law.[169] The validity of these assumptions is much debated.[170] The relevant point, however, is that the worth of original federal question jurisdiction is measured in terms relatively amenable to balancing through district court remand discretion. A district court's exercise of its jurisdiction over federal questions has value precisely to the extent that it would likely render a more accurate[171] verdict than would the state court.[172]

B. *Reasons To Retain All Claims in State Court*

While the rationales for hearing the nonbarred claims in federal court focus on the forum, the arguments for remand of all claims have nothing to do with the virtue of state courts per se. The argument in favor of remand focuses on the value of maintaining a single suit. This section argues that two major factors favor a single suit: judicial economy and fairness to the plaintiff. Every instance of mixed-case removal implicates these considerations to a greater or lesser degree.[173]

317, 328 (1978) ("All grants of federal jurisdiction are based upon some perceived inadequacy of state courts.").

167. *See* REDISH, *supra* note 34, at 1-2.

168. *See, e.g.*, Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 234 (1948) ("[T]he reason for providing the initial federal forum is the fear that state courts will view the federal right ungenerously.").

169. *See, e.g.*, ALI STUDY DRAFT NO. 5, *supra* note 75, at 165-66. Uniformity is a consideration of a different order than are the other three for it focuses not on the likelihood that a federal judge's interpretation of law will be more correct but on the value of consistency per se. The importance of uniformity was a compelling argument for the supremacy of U.S. Supreme Court interpretations of law. *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347-48 (1816). Given the virtual unavailability of Supreme Court review of state court decisions, it is also a powerful factor supporting availability of an initial federal forum.

170. *Compare* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (asserting the superiority of federal courts) *with* Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981) (suggesting independent value of state court constitutional litigation) *and* Michael E. Solimine & James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213 (1983) (purporting to demonstrate that state courts are as likely as are federal courts to vindicate constitutional rights). *See generally* Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233 (1988) (criticizing Solimine and Walker's study, and arguing that parity is an unmeasurable empirical question).

171. "Accuracy" or "correctness" can be measured either conventionally, in terms of conformity to Supreme Court interpretation, *see, e.g.*, Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 159 & n.13 (1953), or in an objectivist sense, in terms of fidelity to the genuine dictates of the Constitution and federal statutes.

172. *See* Gene R. Shreve, *Pragmatism Without Politics — A Half Measure of Authority for Jurisdictional Common Law*, 1991 B.Y.U. L. REV. 767, 785 ("[E]ven if these assumptions do not reflect reality, they do underpin federal question jurisdiction.").

173. The following discussion should not be understood to suggest that judicial economy and

The principal reason for preferring a single suit is pragmatic: simply put, one lawsuit is better than two. It is intuitively sensible, and a fundamental axiom of the Federal Rules of Civil Procedure, that a single wrong be tried in a single action.[174] Equally important, consolidated litigation is less expensive and more efficient, both for the court systems taken together[175] and for the parties. Commentators have increasingly recognized the importance of promoting efficient judicial administration.[176] Meanwhile, the Supreme Court has announced numerous doctrines crafted explicitly to advance judicial economy in such diverse areas as habeas corpus,[177] abstention,[178] and the in-

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fairness are necessarily the only relevant factors weighing against bifurcation. Other factors may be implicated in particular cases. For example, consistent with the principle that courts should dispose of cases so as to avoid passing on constitutional questions whenever possible, *see* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring), the presence of both constitutional and nonconstitutional issues would be an additional consideration favoring preservation of the entire case in a single proceeding. *See* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 118-21 (1984); 465 U.S. at 159-63 (Stevens, J., dissenting); PAUL M. BATOR ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1202 (3d ed. 1988) (observing that *Pennhurst's* holding that the Eleventh Amendment bars all state law claims against states "may deprive the federal court of the chance to avoid a constitutional decision").

174. *See* Thomas M. Mengler, *The Demise of Pendent and Ancillary Jurisdiction,* 1990 B.Y.U. L. REV. 247, 249 (noting a "central tenet of the Federal Rules of Civil Procedure, that the unit of litigation should be the transaction as it occurred in the world").

175. Reducing inefficiency in the courts is of particular urgency given today's well-documented "litigation explosion" and the consequently overcrowded dockets. *See, e.g.,* JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 3-10 (1990) [hereinafter STUDY COMMITTEE REPORT]; HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 15-54 (1973); RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 59-102 (1985); William H. Rehnquist, *Seen in a Glass Darkly: The Future of the Federal Courts,* 1993 WIS. L. REV. 1. *But see* Marc Galanter, *The Life and Times of the Big Six; or, the Federal Courts Since the Good Old Days,* 1988 WIS. L. REV. 921; Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society,* 31 UCLA L. REV. 4 (1983).

176. *See, e.g.,* CHEMERINSKY, *supra* note 18, § 5.4.1, at 276 ("Judicial economy is served by having a matter litigated in one court rather than in two or more tribunals. The splitting of lawsuits increases costs to the parties, wastes social resources, and risks inconsistent verdicts from the different courts."); AMERICAN LAW INSTITUTE, COMPLEX LITIGATION PROJECT: PROPOSED FINAL DRAFT 9 (1993) [hereinafter COMPLEX LITIGATION PROJECT] ("Repeated relitigation of the common issues in a complex case unduly expends the resources of attorney and client, burdens already overcrowded dockets, delays recompense for those in need . . . and contributes to the negative image many people have of the legal system."). Cost has been a first-order concern in our procedural system at least since the Federal Rules of Civil Procedure were revamped in 1938 with the explicit recognition that "[t]hey shall be construed to secure the just, speedy, and inexpensive determination of every action." FED. R. CIV. P. 1.

177. *See, e.g.,* Wainwright v. Sykes, 433 U.S. 72 (1977) (adopting a "cause" and "prejudice" test for excusing procedural defaults in lieu of the "deliberate bypass" standard of Fay v. Noia, 372 U.S. 391 (1963)); McCleskey v. Zant, 111 S. Ct. 1454, 1469 (1991) (applying the *Wainwright* test to successive habeas petitions); Rose v. Lundy, 455 U.S. 509, 519-20 (1982) (requiring dismissal of a petition containing both exhausted and nonexhausted claims); *see also* Schneckloth v. Bustamonte, 412 U.S. 218, 257-58 (1973) (Powell, J., concurring) (prefiguring Stone v. Powell, 428 U.S. 465 (1976), in urging that search and seizure claims not be cognizable on habeas).

178. *See* Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 13-16 (1983); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817-20 (1976) (approving stay or dismissal because of concurrent state proceedings). Whether the *Colorado*

dependent and adequate state grounds doctrine.[179] Congress, too, has devoted sustained attention in recent years to the problem of litigation expense and delay.[180]

Equitable considerations provide the other chief reason to prefer remand of all claims. Ordinarily, a plaintiff can both package her claims as she wishes and choose a federal forum on suits containing federal questions. In the mixed-case removal scenario, the plaintiff has voluntarily forgone her right to litigate her nonbarred federal claims in federal court by originally filing suit in state court.[181] To allow removal to bifurcate that suit would present a plaintiff with an unsettling dilemma: she could either assume the expense, inconvenience, and increased risk of litigating on two fronts[182] or drop the claims in one of the forums. Regardless of the plaintiff's ultimate decision, by forcing her to confront a Hobson's choice — to drop potentially valid causes of action or to assume the burden of litigating two suits — mixed-case removal magnifies the unfairness that the Eleventh Amendment itself works upon plaintiffs[183] who have the ill fortune to allege that the state

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River doctrine is technically a species of abstention has occasioned some debate, the resolution of which is inconsequential. *See, e.g.*, REDISH, *supra* note 34, at 298.

179. *See* Michigan v. Long, 463 U.S. 1032, 1039-40 (1983) (rejecting in dicta, for reasons of judicial efficiency, certification of questions to state court).

180. *See* H.R. REP No. 734, 101st Cong., 2d Sess. 16 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6862 ("Congress has long been concerned with court congestion and workload, and has passed legislation to relieve caseload pressures in virtually every Congress in recent memory . . . .").

181. Concededly, a given plaintiff might contrive a cause of action against the state for the sole purpose of clouding the defendant's right to removal. In such a case, the district court could employ the doctrine of fraudulent joinder to dismiss the claims against the state, thereby creating a single suit of nonbarred claims. *See, e.g.*, See B., Inc. v. Miller Brewing Co., 663 F.2d 545 (5th Cir. Unit A Dec. 1981). Moreover, if the district court believes that the claims against the state are untenable, even if not utterly contrived, it could simply exercise its discretion by retaining jurisdiction over the nonbarred claims. *Cf.* Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 357 (1988) ("A district court can consider whether the plaintiff has engaged in any manipulative tactics when it decides whether to remand a case.").

182. Splitting one's suit increases risk in two ways. First is the risk of incommensurable outcomes: both courts find that the plaintiff is entitled to recover, but each concludes that the defendant in the other action is the only party liable; the plaintiff would have recovered had either court adjudicated the entire suit. *See* John B. Oakley, *Recent Statutory Changes in the Law of Federal Jurisdiction and Venue: The Judicial Improvements Acts of 1988 and 1990,* 24 U.C. DAVIS L. REV. 735, 762 (1991).

Second is the asymmetrical risk of collateral estoppel. A plaintiff will be precluded from relitigating in the second suit any common issues decided against her in the first suit to judgment. *See, e.g.*, Allen v. McCurry, 449 U.S. 90, 94-95 (1980). But, due to lack of privity between the state and private defendants, she will likely be unable to use collateral estoppel as a sword to bar relitigation of issues decided in her favor. *See* STUDY COMMITTEE PAPERS, *supra* note 93, at 557. For an exception in which the state might suffer from issue preclusion, see Duncan v. United States, 667 F.2d 36 (Ct. Cl. 1981) (individual and official capacity claims in which state was involved in defense of the former). Presumably the plaintiff will not suffer claim preclusion under Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75 (1984), because she cannot be faulted for failing to litigate all claims in one suit.

183. Mixed-case removal might also have disproportionate effects upon particular classes of people, given the likely nonrandom distribution of persons who will be plaintiffs and defendants in mixed cases. *Cf.* Susan N. Herman, *Beyond Parity: Section 1983 and the State Courts,* 54 BROOK. L. REV. 1057, 1084-92 (arguing that removal of § 1983 actions should be prohibited).

wronged them.[184] This "fairness factor" assumes added significance given the very real prospect that the defendants' principal purpose in removing the mixed case might be to impose just this dilemma upon the plaintiff.[185]

In light of these competing interests, it is unreasonable to conclude that the district court should either always hear or always remand the nonbarred claims. To be sure, reasonable persons will value the two sets of relevant considerations differently. Because the magnitude of the respective interests varies with the contingencies of any given case, however, all observers should agree that at some point or another the balance shifts.[186] In general, if the nonbarred claims present novel or

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184. Remanding the whole case to state court would work no comparable "unfairness" upon defendants. The preceding section takes into account the defendants' legitimate interest in securing a federal forum: the federal courts' marginal superiority as interpreters of federal law. To term the denial of that forum "unfair" would be double counting.

185. That defendants are sometimes motivated to remove actions for tactical reasons unconnected to an interest in litigating in a federal forum is well recognized. For example, then-Justice Rehnquist's dissent from the *Thermtron* Court's construction of an exception to § 1447(d)'s prohibition on review of remand orders emphasized the danger of providing defendants with an additional weapon in their arsenal of delaying tactics. Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 354-55 (1976) (Rehnquist, J., dissenting); *see also* ALI STUDY DRAFT NO. 5, *supra* note 75, at 91 (commentary to § 1312) (the majority of removals are "probably dictated by purely tactical considerations"). Such tactical behavior should be particularly unacceptable if engineered by the state defendant because it has the power — through waiver of its Eleventh Amendment immunity — to eliminate the plaintiff's postremoval dilemma.

The relevance of the motives animating the defendants' choice to remove, like those underlying the plaintiff's joinder decision, is another good reason to empower district courts with remand discretion. *Cf.* Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 663 (1971) ("The final reason — and probably the most pointed and helpful one — for bestowing discretion on the trial judge as to many matters is, paradoxically, the superiority of his nether position. It is not that he knows more than his loftier brothers; rather, he sees more and senses more.").

186. A balancing approach is warranted so long as neither of the competing sets of interests constitutes a statutory or constitutional trump. *Cf.* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984):

> Respondents urge that . . . "considerations of judicial economy, convenience, and fairness to litigants" . . . counsel against a result that may cause litigants to split causes of action between state and federal courts. . . . [T]he answer to respondents' assertions is that such considerations of policy cannot override the constitutional limitation on the authority of the federal judiciary to adjudicate suits against a State.

465 U.S. at 121-23 (quoting United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966); other citations omitted); Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 377 (1978) (acknowledging the significance of "convenience of litigants . . . [and] judicial economy" but holding that to allow ancillary jurisdiction "would simply flout the congressional command"). Part IV of this Note argues that the removal statutes permit remand of the nonbarred claims. Were courts to reject that argument, Congress can and should amend § 1447(c) to permit such discretionary remand.

On a related note, the nonbinary, nonquantifiable nature of these considerations militates against a legislative solution to the dilemma of how to dispose of the properly removed mixed case. Recognizing that the federal interests favoring remand of the nonbarred claims will sometimes outweigh those underlying their submission to federal jurisdiction, an opponent of judicial discretion might suggest that Congress expressly reject remand discretion while defining with greater specificity the particular circumstances in which the district court must remand the nonbarred claims. The multiplicity and varying weights of factors that would deserve consideration in an ideal jurisdictional allocation, however, pose a very significant limit to the value of even the most perfect legislative rule. *Cf.* Wechsler, *supra* note 168:

complex questions of federal law, the district court should likely hear them even at the expense of a bifurcated suit. On the other hand, if the federal questions presented are routine, and if the plaintiff's claims against the state defendants appear well founded, the district court probably should choose to remand.[187] The majority of cases are likely to fall within these two extremes. In sum, a district court empowered with remand discretion would properly remand some mixed cases in their entirety and entertain the nonbarred components of others.[188]

III. Remand Discretion and the Supreme Court

The conclusion that policy considerations would often advise a district court to remand nonbarred claims provokes the question whether the district courts actually enjoy legal authority to exercise such remand discretion. The inquiry begins with the governing statute, 28 U.S.C. § 1447(c). Section 1447(c) mandates that the district courts remand a case for either a "defect in removal procedure" or lack of "subject matter jurisdiction."[189] Because neither of these bases would

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No formulae for jurisdiction can reflect with full resiliency the complicated values of our federalism. There is no perfect separation between factors that are relevant to jurisdiction and those that should have bearing only on the manner of its exercise. However well devised the general standards, correctives will be needed in particular situations that are not readily articulated in a statutory rule.

Id. at 218.

187. *Cf.* Bryant v. Ford Motor Co., 832 F.2d 1080, 1090 (9th Cir. 1987) (en banc) (Kozinski, J., dissenting) ("When state and federal courts are barely able to handle their burgeoning caseloads, and there are frequent and justified complaints about the cost and delay of litigation, the court should be reluctant to fashion a rule that will cause such wholesale duplication of effort."), *cert. granted,* 488 U.S. 816, *cert. dismissed,* 488 U.S. 986 (1988). In the 1988 Judicial Improvements and Access to Justice Act, Congress vindicated Judge Kozinski's criticisms by amending § 1441(a) to ensure that the presence of Doe defendants could not delay removal. Pub. L. No. 100-702, § 1016, 102 Stat. 4642, 4669.

188. There are reasons to believe that the courts that found mixed cases nonremovable were, consciously or not, exercising pseudoremand discretion in the guise of objective determinations regarding removal jurisdiction. First, the possible arguments for nonremovability of mixed cases are really quite weak. Second, the opinions are shamelessly conclusory. Most significantly, two of the opinions expressed a decided aversion to the hypertechnical application of procedural rules. *See* Simmons v. California, 740 F. Supp. 781, 785 (E.D. Cal. 1990) ("[A]lthough the private defendants' argument is premised on an abstractly accurate description of the pleadings, the conclusions they draw cannot stand."); Kelly v. California, 687 F. Supp. 1494 (D. Nev. 1988), *affd.,* 880 F.2d 416 (9th Cir. 1989):

> During my twenty-five years as a federal judge I have been impressed by the fact that in civil litigation approximately fifty percent of my time has been devoted to attempting to solve intricate, difficult, perplexing, thorny, and frequently imponderable issues of federal jurisdiction. In my view this is one of the great deficiencies of the federal judicial system. An inordinate amount of lawyer and judicial effort must be spent on trying to establish that the court has authority to do what one or both of the parties want it to do rather than on the merits of the litigation.

687 F. Supp. at 1495.

189.

> A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

justify remand of the nonbarred federal question claims in a properly removed mixed case, the essential question is whether these two grounds are exclusive. The answer hinges on whether the statute is construed to mean: (1) a district court *shall* remand for either of the two grounds, and shall *not* remand otherwise; or (2) the court *shall* remand for either of these two grounds, and *may* remand otherwise. This Note terms these constructions the *prohibitory* and *permissive interpretations,* respectively.[190] Although commentators have long assumed uncritically that district courts may not remand claims that fall within their subject matter jurisdiction,[191] the language of section

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28 U.S.C. § 1447(c) (1988).

Although the language does not make this clear, remand for procedural defect is obligatory. Prior to amendment in 1988, § 1447(c) read in pertinent part: "If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case . . . ." *See* 28 U.S.C. § 1447(c) (1982). Congress intended the amendment only to establish a time limit for plaintiffs to object to a removal defect. *See* WRIGHT ET AL., *supra* note 34, § 3739. The House Report expresses no intention to lessen the district courts' obligation to remand for procedural defect so long as the plaintiff's motion for remand is timely. *See* H.R. REP. No. 889, 100th Cong., 2d Sess. 73 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5982, 6033. Because courts had uniformly read the phrase "improvidently and without jurisdiction" disjunctively to refer to either procedural defect or lack of jurisdiction, *see* FDIC v. Alley, 820 F.2d 1121, 1124 (10th Cir. 1987); Robert T. Markowski, Note, *Remand Order Review After* Thermtron Products, 1977 U. ILL. L.F. 1086, 1092-93, and because " 'it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect, unless such intention is clearly expressed,' " Finley v. United States, 490 U.S. 545, 554 (1989) (quoting Anderson v. Pacific Coast S.S. Co., 225 U.S. 187, 199 (1912)), there is no difference, for purposes of this Note, between the present form of § 1447(c) and the version in effect when the Supreme Court decided *Thermtron* and *Carnegie-Mellon.*

190. The permissive reading holds not that § 1447(c) confers unbridled discretion upon district judges, but only that Congress intended to vest district courts with some undefined residue of discretion to remand for reasons beyond those specified. *See* David L. Shapiro, *Jurisdiction and Discretion,* 60 N.Y.U. L. REV. 543, 547 (1985) ("[I]n some instances the primary purpose of conferring a power to choose is to foster the development of rules for the finer tuning of general jurisdictional grants. Only rarely are courts given unlimited power to make continuing, ad hoc choices."). For a more general discussion of the various uses of the term *discretion,* see RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 31-39 (1977).

191. *See, e.g.,* CHEMERINSKY, *supra* note 18, at 217, 291; WRIGHT, *supra* note 96, § 41, at 235. The few commentaries on *Thermtron* all focus on its treatment of § 1447(d), apparently finding its discussion of § 1447(c) unremarkable. *See* J. Michael Myers, *Federal Appellate Review of Remand Orders: Expansion or Eradication?,* 48 MISS. L.J. 741, 750-52 (1977); Joseph T. Carruthers, Note, 12 WAKE FOREST L. REV. 1031 (1976); Tony M. Graham, Recent Developments, 12 TULSA L.J. 194 (1976); Elizabeth S. Kelly, Casenote, 1976 S. ILL. U. L.J. 541; C. Lee, Casenote, 10 CREIGHTON L. REV. 521 (1977); Markowski, Note, *supra* note 189; Paul V. Muething, Recent Case, 45 U. CIN. L. REV. 288 (1976); Stephen V. Rible, Comment, *Federal Courts: Review of the Remand Order,* 9 ST. MARY'S L.J. 274 (1977). Carruthers alone flagged the issue:

> While the statute does not specify that remand is possible *only* under such conditions, it may be assumed that Congress intended the stated grounds for remand to be exclusive. Indeed, no case suggests that a district court is vested with discretion in remand decisions while several assert that no such discretionary power exists.

Carruthers, *supra,* at 1033-34. This passage contains two footnotes. The first supports the author's assumption regarding congressional intent with an indirect reference to the canon of statutory interpretation, *expressio unius est exclusio alterius* (the expression of one excludes others). *Id.* at 1033 n.19. On the inapplicability of this canon, see *infra* note 244. The second notes rightly: "None of the cases, however, offered any reasons or cited any authority to support their opinions." *Id.* at 1034 n.20.

1447(c) supports either interpretation.[192]

This Part examines the Supreme Court's treatment of the ambiguous remand provision. Section III.A discusses the Court's 1976 decision in *Thermtron Products, Inc. v. Hermansdorfer.*[193] This section identifies and questions the widely held view that the *Thermtron Products* Court affirmed the prohibitory construction of section 1447(c). Section III.B investigates the Court's most recent pronouncement on section 1447(c), its 1988 decision in *Carnegie-Mellon University v. Cohill.*[194] In *Carnegie-Mellon,* the Supreme Court clearly established that the express grounds of section 1447(c) do not constitute the exclusive bases for remand. Unfortunately, in rejecting the prohibitory reading of section 1447(c), the Court did not clarify what may constitute permissible grounds for remand when removal is technically and jurisdictionally proper. This section argues that, although the issue is debatable, the best reading of *Carnegie-Mellon* allows discretionary remand in the interests of judicial economy, convenience, and fairness. If so, Supreme Court precedent would permit district courts to remand the nonbarred claims of removed mixed cases.

A. Thermtron Products *and the Argument Against Extrastatutory Remand*

The Supreme Court first addressed section 1447(c)'s inherent ambiguity in *Thermtron Products, Inc. v. Hermansdorfer.*[195] In that case, the district court had remanded a personal injury suit, removed pursuant to diversity jurisdiction, on the sole grounds that its overcrowded docket would excessively delay a trial. The district judge had reasoned that such a delay would violate the plaintiffs' " 'right to a speedy decision on the merits of their cause of action.' "[196] The defendants petitioned for a writ of mandamus to order the district judge to hear the case. The Sixth Circuit denied the petition on the grounds that section 1447(d) barred it from reviewing the district court's remand order.[197] The Supreme Court entertained the petition. It held that section 1447(d) only barred review of remand orders issued pursuant to section 1447(c) and that orders to remand based on grounds other than those expressly authorized by statute are reviewable.[198] The

192. *See* Rothner v. City of Chicago, 879 F.2d 1402, 1422 (7th Cir. 1989) (Easterbrook, J., dissenting) ("*Carnegie-Mellon* responded to the problem that . . . nothing in § 1447(c) says that 'improvidently and without jurisdiction' are the only grounds of remand.").

193. 423 U.S. 336 (1976).

194. 484 U.S. 343 (1988).

195. 423 U.S. 336 (1976).

196. 423 U.S. at 340 (quoting Record at 36).

197. 423 U.S. at 341-42. 28 U.S.C. § 1447(d) (1988) reads in relevant part: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . ."

198. 423 U.S. at 345-46 (Sections 1447(c) and (d) " 'are *in pari materia* [and] are to be con-

Court concluded that "[t]he District Court exceeded its authority in remanding on grounds not permitted by the controlling statute."[199] It added in a footnote: "Lower federal courts have uniformly held that cases properly removed from state to federal court within the federal court's jurisdiction may not be remanded for discretionary reasons not authorized by the controlling statute."[200]

Accordingly, most lower courts and commentators understood *Thermtron* to hold that district courts may not remand for any reasons beyond those expressly authorized.[201] But the Court's holding can be read much more narrowly: "[A]n otherwise properly removed action may [not] be remanded because the district court considers itself too busy to try it . . . ."[202] Such a reading would understand the Court's comment that it is "*not convinced* that Congress ever intended to extend *carte blanche authority* to the district courts to . . . remand[] cases on grounds that seem justifiable to them but which are not recognized by the controlling statute,"[203] to leave for other disputants to convince the court precisely how much authority Congress *did intend* to extend. According to this reading, the Court did not adopt the prohibitory reading of section 1447(c). Rather, the Court remained agnostic regarding the statute's precise contours. The holding of *Thermtron,* then, would be merely "that a district court may not remand a case removed from state court on diversity grounds when the *sole reason* for remanding [is] the district court's crowded docket."[204]

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strued accordingly rather than as distinct enactments . . . .' This means that only remand orders issued under § 1447(c) and invoking the grounds specified therein . . . are immune from review under § 1447(d).") (quoting Employers Reinsurance Corp. v. Bryant, 299 U.S. 374, 380 (1937)) (alteration in original).

199. 423 U.S. at 345 (footnote omitted).

200. 423 U.S. at 345 n.9. Note, though, that all the cases cited reflect some ambivalence or uncertainty about their conclusions. For example, in Romero v. ITE Imperial Corp, 332 F. Supp. 523 (D.P.R. 1971), the court qualified its assertion that "[o]nce the statutory requirements for the right of removal have been met, this court cannot order a remand on discretionary grounds such as the alleged speedier trial to be afforded the plaintiff," by expending rather more ink in disputing "[p]laintiff's argument . . . that a remand would speed up the proceedings." 332 F. Supp. at 526. In Vann v. Jackson, 165 F. Supp. 377 (D.N.C. 1958), the court's conclusion ultimately rests on nothing more than its initial allocation of the burden of proof. 165 F. Supp. at 380-81.

201. *See, e.g.,* Sheet Metal Workers Intl. Assn. v. Seay, 696 F.2d 780, 782 (10th Cir. 1983); Levy v. Weissman, 671 F.2d 766, 769 (3d Cir. 1982); Ryan v. State Bd. of Elections, 661 F.2d 1130, 1134 (7th Cir. 1981); *In re* Shell Oil Co., 631 F.2d 1156, 1158 (5th Cir. 1980); 14 WRIGHT ET AL., *supra* note 34, § 3739, at 576. *But see In re* Romulus Community Sch., 729 F.2d 431, 436 (6th Cir. 1984) ("The Supreme Court's forceful pronouncements in *Thermtron* against remands unauthorized by statute were prompted by the extreme circumstances of that case."). Even after *Carnegie-Mellon,* courts tend to read *Thermtron* footnote nine as containing its holding. *See, e.g.,* Rothner v. City of Chicago, 879 F.2d 1402, 1407 (7th Cir. 1989).

202. 423 U.S. at 344.

203. 423 U.S. at 351 (emphasis added).

204. Shapiro, *supra* note 190, at 587 n.271 (emphasis added).

B. Carnegie-Mellon *and Remand Discretion*

While the Court has not subsequently read *Thermtron* quite so restrictively, it has clearly rejected the prohibitory construction of section 1447(c). In *Carnegie-Mellon University v. Cohill,*[205] the Court affirmed a basis for remand beyond those expressly authorized by statute. The *Carnegie-Mellon* plaintiffs brought suit in state court alleging both state and federal causes of action sounding in, inter alia, age discrimination, breach of contract, and wrongful discharge. The university defendant then removed pursuant to section 1441(a) on the grounds that the district court had original federal question jurisdiction over the federal law claim and pendent jurisdiction over the state law claims. Six months later, the plaintiffs amended their complaint to delete the federal claims and moved to remand. The district court granted the motion while correctly noting that, because it retained subject matter jurisdiction over the pendent claims, it lacked explicit statutory authorization to remand.[206] A divided panel of the Third Circuit, reading *Thermtron* to disallow discretionary remands, issued a writ of mandamus ordering the district court to vacate its remand order. Subsequently the Third Circuit granted plaintiffs' petition for rehearing en banc and reversed the panel, denying defendants' petition for a writ of mandamus without opinion.[207] The plaintiffs did not question that the pendent jurisdiction doctrine grants the district court discretion to dismiss without prejudice a case in which all federal law claims have been eliminated and only pendent state law claims remain.[208] The issue on certiorari was "whether the District Court could relinquish jurisdiction over the case only by dismissing it without prejudice or whether the District Court could relinquish jurisdiction over the case by remanding it to state court as well."[209] The Supreme Court held that the district court could remand.

Unquestionably, *Carnegie-Mellon* holds that, despite *Thermtron*'s language to the contrary,[210] section 1447(c) does not furnish the sole permissible grounds for remand.[211] However, it also rejects the notion that section 1447(c) might authorize unbounded remand discretion.[212]

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205. 484 U.S. 343 (1988).

206. Boyle v. Carnegie-Mellon Univ., 648 F. Supp. 1318, 1320 (W.D. Pa. 1985), *mandamus granted sub nom.* Carnegie-Mellon Univ. v. Cohill, 41 Fair Empl. Prac. Cas. (BNA) 1046 (3d Cir.), *vacated,* 45 Fair Empl. Prac. Cas. (BNA) 1163 (3d Cir. 1986), *affd.,* 484 U.S. 343 (1988).

207. Carnegie-Mellon Univ. v. Cohill, 41 Fair Empl. Prac. Cas. (BNA) 1046 (3d Cir.), *vacated,* 45 Fair Empl. Prac. Cas. (BNA) 1163 (3d Cir. 1986), *affd.,* 484 U.S. 343 (1988). For a summary of the procedural history of the case, see Steinman, *supra* note 137, at 950-53.

208. 484 U.S. at 350 (citing United Mine Workers v. Gibbs, 383 U.S. 715, 726-27 (1966)).

209. 484 U.S. at 351.

210. 484 U.S. at 355 ("The language from *Thermtron* . . . viewed in isolation, is admittedly far-reaching, but it loses controlling force when read against the circumstances of that case.").

211. 484 U.S. at 353-54.

212. *See* 484 U.S. at 356 (reaffirming the result in *Thermtron* by terming the district court remand order at issue in that case "clearly impermissible").

Consequently, the precise scope for remand discretion that *Carnegie-Mellon* allows is unclear. Its immediate result can be predicated on at least three different theories of increasing breadth: a district court may exercise discretion to remand (1) pendent claims when it has disposed of all federal question claims; (2) any claims that reached it through removal, whenever it would have discretion to dismiss them without prejudice had the plaintiff originally filed suit in federal court; or (3) any claims in the interests of judicial economy, convenience, and fairness. This section examines the first two rationales and acknowledges that each enjoys textual support and either scholarly or judicial approval. It argues, however, that neither can explain the whole of the Court's opinion. This section concludes that the third interpretation best captures the reasoning and tone of *Carnegie-Mellon.*

1. *Reading One: Remand Discretion Is Limited to Pendent Claims*

Commentators frequently read *Carnegie-Mellon* only to authorize remand of pendent claims.[213] Moreover, the Court's own statement of its holding would seem to favor this narrow reading.[214] The issue, however, is whether the Court's *ratio decidendi* can logically be limited to pendent claims. The Court presents an ostensible rationale that would permit such a limitation. The reasoning appears, stripped to its essentials, in a footnote:

> The dissent's claim that our decision renders superfluous the two provisions of the removal statute that authorize remands is unjustified. The remand power that we recognize today derives from the doctrine of pendent jurisdiction and applies only to cases involving pendent claims. Sections 1441(c) and 1447(c) . . . do not apply to cases over which a federal court has pendent jurisdiction. Thus, the remand authority conferred by the removal statute and the remand authority conferred by the doctrine of pendent jurisdiction overlap not at all.[215]

This mode of analysis should look familiar. Just as the Court in *Thermtron* had read sections 1447(c) and (d) *in pari materia,*[216] here it reads the statutory remand provisions *in pari materia* with the statutory removal provisions: because pendent claims are removed pursuant to judge-made law, and not statutory authority, their remand is

213. *See, e.g.,* Mengler, *supra* note 174, at 276 n.137; Charles Rothfeld, *Rationalizing Removal,* 1990 B.Y.U. L. REV. 221, 225-26 (*Carnegie-Mellon* provides for remand "when, after removal has been effected, all federal claims are dismissed and only pendent state law claims remain in the case."); Steinman, *supra* note 137, at 957-59. It is worth noting that Steinman believes that *Carnegie-Mellon* was wrongly decided, emphasizing that "the grounds for remand explicitly stated in the statutes *are* exclusive." *Id.* at 959-60, 969, 970. Unfortunately, these conclusory assertions constitute the whole of Steinman's argument for the prohibitory construction of § 1447(c).

214. "We conclude that a district court has discretion to remand to state court a removed case involving pendent claims upon a proper determination that retaining jurisdiction over the case would be inappropriate." 484 U.S. at 357.

215. 484 U.S. at 355 n.11.

216. *See supra* note 198.

likewise governed solely by judicial doctrine.[217]

2. *Reading Two: Remand Discretion Tracks Dismissal Discretion*

Lower courts have paid scant attention to the Supreme Court's effort to cabin remand discretion to those situations — pendent and ancillary jurisdiction — in which the exercise of jurisdiction would itself be extrastatutory.[218] Rather, the courts of appeals have tended to read *Carnegie-Mellon* to authorize remand discretion coextensive with a district court's power of dismissal.[219] This reading is warranted by the Court's apparent effort to limit *Thermtron*'s bar of extrastatutory remands to situations in which dismissal as well would be unauthorized.[220] If concerns over the costs of delay and the potential tolling of the state statute of limitations justify district court discretion to remand rather than dismiss removed *pendent* claims,[221] they should also

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217. Elsewhere the opinion notes:

> The principal flaw in petitioners' argument is that it fails to recognize that the removal statute does not address specifically *any* aspect of a district court's power to dispose of pendent state-law claims after removal . . . . Yet petitioners concede, as they must, that a federal court has discretion to dismiss a removed case involving pendent claims.

484 U.S. at 354.

218. Of course, the 1990 enactment of 28 U.S.C. § 1367 establishes that the exercise of pendent or ancillary jurisdiction is no longer extrastatutory. *See infra* notes 268-80 and accompanying text.

219. *See, e.g.*, McDermott Intl. Inc. v. Lloyds Underwriters, 944 F.2d 1199, 1202-03 (5th Cir. 1991) (contractual forum-selection clause); Corcoran v. Ardra Ins. Co., 842 F.2d 31, 36 (2d Cir. 1988) (abstention); *see also* Hays County Guardian v. Supple, 969 F.2d 111, 125 (5th Cir. 1992) (Eleventh Amendment), *cert. denied*, 113 S. Ct. 1067 (1993).

Reading *Carnegie-Mellon* to correct a procedural quirk so as to accord the district courts discretion to remand any action on removal that they would be able to dismiss on jurisdictional grounds if originally filed in federal court supports the initial assumption of Part II that the district court should remand, instead of dismiss, the barred claims of a removed mixed case. *See supra* text accompanying notes 154-58. Of course, the third reading, although broader than the second, would also favor remand discretion coextensive with dismissal discretion. *See infra* notes 232-33 and accompanying text. Because the district courts do not, and should not, possess discretion to dismiss the nonbarred claims of a mixed case filed in federal court, adoption of the second reading in lieu of the third reading would not provide for mixed-case remand discretion.

220.

> In *Thermtron*, the District Court had no authority to decline to hear the removed case. . . . In contrast, when a removed case involves pendent state-law claims, a district court has undoubted discretion to decline to hear the case. The only remaining issue is whether the district court may decline jurisdiction through a remand as well as through a dismissal. The *Thermtron* opinion itself recognized this distinction by stating that federal courts have no greater power to remand cases because of an overcrowded docket than they have to dismiss cases on that ground. The implication of this statement, which is confirmed by common sense, is that an entirely different situation is presented when the district court has clear power to decline to exercise jurisdiction.

484 U.S. at 356 (citation omitted).

221. This premise is not uncontested. Professor Steinman has contended that, even if Congress had thought about the problem, it still may have preferred dismissal to remand. Steinman, *supra* note 137, at 959. This is presumably because, as Judge Stapleton conceded, dismissals are subject to automatic appellate review whereas remands are, at most, subject to review by writ of mandamus. Carnegie-Mellon Univ. v. Cohill, 41 Fair Empl. Prac. Cas. (BNA) 1046, 1053 (3d Cir. 1986) (Stapleton, J., dissenting), *vacated*, 45 Fair Empl. Prac. Cas. 1163 (3d Cir. 1986), *affd.*, 484 U.S. 343 (1988). The significant point at present is that the *Carnegie-Mellon*

justify remand of all removed claims that the district court might dismiss.[222]

Moreover, the *in pari materia* argument — section 1447(c) governs statutory removals; extrastatutory remands are permitted over extrastatutory removals — does not withstand scrutiny. Recall that the argument of footnote eleven serves not to *justify* the holding, but to *limit* it.[223] This limitation could be effective only if the Court had denied that section 1447(c) precludes remand in cases of extrastatutory removal, yet simultaneously had affirmed the prohibitory construction of section 1447(c) over the universe of statutorily authorized removals.[224] The Court avoids such a move throughout its opin-

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Court accepted the premise. The implications of limited appellate review for any discretionary remand rule are considered *infra* in text accompanying notes 234-36; *infra* note 297.

222. Indeed, the cases cited by the *Carnegie-Mellon* Court as "approving remand of remaining pendent state-law claims when all federal claims were eliminated from the case," 484 U.S. at 348 n.5, assert the more general principle that remand discretion should track dismissal power. *See In re* Romulus Community Sch., 729 F.2d 431, 436-40 (6th Cir. 1984); Fox v. Custis, 712 F.2d 84 (4th Cir. 1983):

> Remand in removed cases comes to exactly the same thing [as dismissal without prejudice] so far as any discernible federal interest is concerned. And of course remand is more direct, less costly, and more protective in other ways to the plaintiff who originally chose the state forum. To insist that only dismissal without prejudice lies because of a lack of specific statutory authority for remand seems an unduly rigid reading of those statutes that do address the subject of remand directly.

712 F.2d at 89 n.4. The third opinion representing that side of the circuit split merely takes the propriety of remand for granted, offering no analysis. Hofbauer v. Northwestern Natl. Bank, 700 F.2d 1197, 1201 (8th Cir. 1983).

Likewise, before *Carnegie-Mellon,* both the Second and Ninth Circuits had validated district court power to remand removed cases based on prelitigation waiver of forum choice. *See* Karl Koch Erecting Co. v. New York Convention Ctr. Dev. Corp., 838 F.2d 656 (2d Cir. 1988) (decided two weeks after *Carnegie-Mellon,* but making no mention of that case, nor even considering that remand might be disallowed); Clorox Co. v. United States Dist. Ct., 779 F.2d 517 (9th Cir. 1985); Pelleport Investors Inc. v. Budco Quality Theatres, Inc., 741 F.2d 273 (9th Cir. 1984).

223. That is, the alleged inapplicability of § 1447(c) to extrastatutory remands does not itself dictate that district courts have the discretionary power to remand removed pendent claims. After the Court had advanced pragmatic and equitable reasons for permitting remand discretion in the case at bar, it dropped footnote 11 to address the dissenters' warning that recognition of such considerations would have far-reaching consequences. *See supra* notes 214-17 and accompanying text.

224. This point requires qualification. In theory, the Court could have sustained the *in pari materia* argument without affirming the prohibitory construction of § 1447(c) if it had remained agnostic concerning whether Congress in fact intended all statutory removals to be governed by the statutorily articulated grounds for remand. The Court could then limit remand discretion to pendent claims by asserting that the Court lacks power to remand in the face of congressional silence. Internal tensions, however, would have prevented the *Carnegie-Mellon* Court from making this move. To do so would have required it to approve of the Court's assertion, in United Mine Workers v. Gibbs, 383 U.S. 715 (1966), of a common law power to *assume* jurisdiction not granted by statute, while simultaneously rejecting a common law power to *decline* the exercise of jurisdiction statutorily authorized.

To be sure, commentators have vigorously debated the validity of Chief Justice Marshall's admonition: "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution." Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821). But Professor Martin Redish is seemingly alone in intimating that the courts might enjoy even *less* common law power to "decline" than to "usurp." *See* Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the*

ion.[225] In fact, the only support for this move appears in footnote eleven, an afterthought offered to rebut the dissent.[226]

The problem with the second potential reading — that a district court has discretion to relinquish jurisdiction through remand only when it has discretion to dismiss removed claims without prejudice — is that it is simply not consonant with the tenor of the opinion as a whole. If the Court perceived itself as merely "filling in" a gap created by judicial and congressional oversight, then one would expect it to have emphasized the dictates of common sense.[227] In other words, reduction of *Carnegie-Mellon* to the second reading would render gratuitous the body of the decision that seems to attribute particular significance to pendent claims. The opinion's lengthy discussion of pendent jurisdiction and the values it serves makes incredible the claim that a single paragraph[228] that distinguishes *Thermtron* by focusing on the presence or absence of dismissal discretion contains the whole of the Court's reasoning.

3. *Reading Three: Remand Discretion Serves Judicial Economy, Fairness, and Convenience*

The forgoing analysis indicates that, while both favored readings of *Carnegie-Mellon* reveal some truth, neither is wholly adequate. Ironically, then, the surface plausibility of, and textual support for, *both* of the first two theories of the opinion draw *each* into question. What is needed is an understanding of *Carnegie-Mellon*'s reasoning that takes

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Judicial Function, 94 YALE L.J. 71, 114 (1984) [hereinafter Redish, *Abstention*] ("Although a federal court's decision to infer a private cause of action may arguably invade the legislative process, judge-made abstention presents a considerably greater risk of judicial usurpation."). More recently, however, Redish has emphasized that the critical inquiry focuses on the court's reason for departing from a congressional directive, not on whether the particular departure results in the exercise or declination of jurisdiction. *See* Martin H. Redish, *Judicial Parity, Litigant Choice,* 36 UCLA L. REV. 329, 355-56 (1988) [hereinafter Redish, *Judicial Parity*]. The rationales that really were implicated in *Carnegie-Mellon* — judicial economy, fairness, and convenience — least implicate separation of powers concerns. *See generally* Shreve, *supra* note 172.

225. Most notably, *Carnegie-Mellon*'s characterization of *Thermtron* would make no sense if the Court had adopted the prohibitory construction. Elsewhere in the opinion, the Court notes the absence of any basis to support the prohibitory inference. *See, e.g.,* 484 U.S. at 353 ("Petitioners argue that the federal removal statute prohibits a district court from remanding properly removed cases involving pendent claims. *This argument is based not on the language of Congress, but on its silence.*") (emphasis added).

226. *Carnegie-Mellon,* 484 U.S. at 355 n.11. Also discounting the significance of the *in pari materia* argument is Steinman, *supra* note 137, at 954 (observing that *Carnegie-Mellon*'s interpretation of *Thermtron* as inapplicable when dismissal would be authorized "has opened a Pandora's Box" and that footnote 11 "will not keep the lid on [it]").

227. In similar circumstances, the Court has appealed more expressly to practical reasoning. *See* Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 837 (1989) (stating that plaintiffs "should not be compelled to jump through these judicial hoops merely for the sake of hypertechnical jurisdictional purity"); *cf.* Staub v. City of Baxley, 355 U.S. 313, 320 (1958) (holding a state procedural rule inadequate, strict compliance with which "would be to force resort to an arid ritual of meaningless form").

228. 484 U.S. at 355-56.

seriously both the Court's focus on pendent jurisdiction and its appreciation that discretion to dismiss should entail discretion to remand. This dual requirement favors the third and broadest characterization of the Court's opinion: remand discretion is generally permissible in the interest of judicial economy, convenience, fairness, and comity.

The Court's appeals, on page after page, to the principles of "economy, convenience, fairness, and comity,"[229] suggest that these values, and not aversion to jurisdictional hypertechnicality, drive the decision. The *Carnegie-Mellon* dissent reads the Court's opinion in precisely this way.[230] Again, a single passage from the majority opinion is particularly illustrative:

> [T]he pendent jurisdiction doctrine is designed to enable courts to handle cases involving state-law claims in the way that will best accommodate the values of economy, convenience, fairness, and comity, and *Gibbs* further establishes that the Judicial Branch is to shape and apply the doctrine in that light. Because in some circumstances a remand of a removed case involving pendent claims will better accommodate these values than will dismissal of the case, *the animating principle behind the pendent jurisdiction doctrine supports giving a district court discretion to remand* when the exercise of pendent jurisdiction is inappropriate.[231]

The third reading rests on the insight that the pendent jurisdiction doctrine, per se, does no real work in the above analysis. The doctrine of pendent jurisdiction itself instantiates the broader principle that courts can effectively add to and subtract from statutory grants of jurisdiction in the interests of judicial economy, fairness, convenience, and comity. Just as the belief that federal courts should exercise their discretion in the interests of common law jurisdictional values drives the doctrine of pendent jurisdiction in the first place, this "animating principle" alone drives remand discretion.[232] The fact that the animating principle of *Carnegie-Mellon* was embodied in the doctrine of pendent jurisdiction is of no moment. The reasons to prefer remand over dismissal likewise arise from considerations of judicial economy, convenience, and fairness.[233] Thus, both the first and second readings justify remand discretion by reference to the same underlying complex of values — judicial economy, convenience, and fairness.

In sum, of the three proposed readings of *Carnegie-Mellon,* the third coheres best with the specific language and general tenor of the opinion. Under this view, district courts enjoy inherent common law

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229. 484 U.S. at 348-51, 353, 357.

230. 484 U.S. at 359 (White, J., dissenting) ("[T]he Court discovers an inherent authority to remand whenever a federal judge decides that 'the values of economy, convenience, fairness, and comity' would thereby be served.").

231. 484 U.S. at 351 (emphasis added).

232. *See, e.g.,* Rothner v. City of Chicago, 879 F.2d 1402, 1416 (7th Cir. 1989) ("As indicated by *Carnegie-Mellon* . . . the values of judicial economy, fairness, convenience and comity justify supplementation of statutory rules with common law doctrines.").

233. *See supra* text accompanying notes 154-56; *supra* note 222.

power to remand a case in exceptional circumstances in the interests of judicial economy, convenience, fairness, and comity. This reading alone explains the two most conspicuous features of the opinion: the reaffirmation of pendent jurisdiction and the significance it attributes to the fact that, in *Thermtron,* Judge Hermansdorfer lacked *both* dismissal and remand discretion. Importantly, the third reading, although undeniably broad, would still be consistent with other Supreme Court common law decisions that disfavor piecemeal litigation.[234]

To identify the considerations that fundamentally drove the Court's analysis is *not* to say that *Carnegie-Mellon* authorizes a district court to remand a case whenever it determines that the values of judicial economy, convenience, fairness, and comity so warrant. The sharp constraints to appellate review of remand orders militate against such an extension of the Court's holding. In other words, although *Carnegie-Mellon* suggests that the federal judiciary enjoys discretion to remand removed actions in the interests of judicial economy and fairness, the practical limits to effective appellate review of remand or-

234. Supreme Court doctrines approving lower court discretion to decline jurisdiction to avoid piecemeal or duplicative litigation include forum non conveniens and *Colorado River* abstention. On forum non conveniens, see Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947). For the related power to stay rather than transfer proceedings because of related proceedings already pending in another federal court, see Landis v. North Am. Co., 299 U.S. 248, 254 (1936) (affirming "the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants"). *Colorado River* abstention permits a district court to stay or dismiss an action, in exceptional circumstances, in light of duplicative state court proceedings. *See* Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).

It is at least arguable that the *Colorado River* doctrine would itself allow discretionary remand of nonbarred claims in some instances of mixed-case removal. The paradigmatic situation for *Colorado River* abstention is when the parties are the same in both forums but their posture is reversed, as when plaintiff in a state court coercive action is defendant to a declaratory judgment action in federal court. However, the barred and nonbarred claims of a mixed case might be so similar that the two actions, if bifurcated, would be more properly deemed duplicative than piecemeal. An obvious example would be a case consisting solely of § 1983 official and individual claims. *Cf.* Hays County Guardian v. Supple, 969 F.2d 111 (5th Cir. 1992), *cert. denied,* 113 S. Ct. 1067 (1993). In this instance of mixed-case removal — in which neither the courts nor any party apparently contemplated that the presence of a barred claim rendered the action nonremovable — the Fifth Circuit, in an opinion by Judge Higginbotham, approved remand of the barred state law claims against state defendants in their official capacities. It also upheld the district court's order remanding, pursuant to § 1367(c), the nonbarred pendent claims against the same state officials in their individual capacities. The court reasoned that "[a]djudicating state-law claims in federal court while identical claims are pending in state court would be a pointless waste of judicial resources." 969 F.2d at 125.

Although abstention is usually effected by dismissal or stay, there is no reason after *Carnegie-Mellon* that a district court could not abstain from a removed case by remanding it. *See* Corcoran v. Ardra Ins. Co., 842 F.2d 31, 36 (2d Cir. 1988). A 1981 Seventh Circuit decision holding the contrary, on the grounds that § 1447(c) provides the exclusive bases for remand, Ryan v. State Bd. of Elections, 661 F.2d 1130, 1134 (7th Cir. 1981), would seem to be overruled. *But see Rothner,* 879 F.2d at 1421 n.1 (Easterbrook, J., dissenting) (asserting, without analysis, that "the holding (as opposed to the rationale) that you can't 'abstain' by remanding a case doubtless survives *Carnegie-Mellon*").

ders[235] counsel that such unbridled discretion not be conferred upon the district courts. Thus, a lower court can make use of *Carnegie-Mellon's* expansive reasoning only by crafting particularized rules that appellate courts could police on mandamus. The *Carnegie-Mellon* holding explicitly creates one such rule: district courts may remand pendent claims when all federal question claims are eliminated. The opinion also strongly suggests, and lower courts have since actualized, a second: district courts may remand claims that they might otherwise dismiss. Mixed-case removal should reasonably implicate a third: district courts may remand claims within their jurisdiction after remanding joined claims barred by the Eleventh Amendment. Presumably, courts and litigants would, over time, advance other useful and manageable rules and standards.

The inquiry does not end here, however. The superficial support in the *Carnegie-Mellon* opinion for either of two narrower readings, and the resulting logical tensions, suggest that the relatively broad reading advocated here may not have enjoyed the approval of all Justices in the majority. Additionally, the present Supreme Court — which, in its constriction of pendent and ancillary jurisdiction, has manifested considerable hostility to judge-made jurisdictional law[236] — is not likely to read *Carnegie-Mellon* expansively.[237] Accordingly, it is not

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235. *Carnegie-Mellon* did not disturb the rule, implied by *Thermtron* and affirmed in Gravitt v. Southwestern Bell Tel. Co., 430 U.S. 723 (1977), that § 1447(d) prohibits any appellate review of remand orders ostensibly predicated on either of the two grounds specified in § 1447(c). The prevailing view among the courts of appeals is that nonstatutory remand orders authorized by *Carnegie-Mellon* are reviewable by mandamus only, except that remands in lieu of dismissal that follow a substantive decision on the merits — such as interpretation of a contractual forum-selection clause — are reviewable on appeal. *See, e.g., In re* Amoco Petroleum Additives Co., 964 F.2d 706, 708 (7th Cir. 1992); *Corcoran,* 842 F.2d at 34-35 (following, but criticizing, the general bar to review by direct appeal of discretionary remand orders).

236. *See infra* notes 272-75 and accompanying text.

237. Predictions are made difficult by the high turnover on the Court in the five years since *Carnegie-Mellon.* Since that five-to-three decision, Justice Kennedy joined the Court; Justices Souter and Thomas have replaced Justices Brennan and Marshall, both of whom were in the majority; and Justice Ginsburg has replaced the author of the dissent, Justice White. It is noteworthy, though, that Chief Justice Rehnquist and Justice Scalia remain from a dissent that voted to reaffirm *Thermtron's* avowed holding that district courts cannot remand cases without express statutory authorization. Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 358 (1988) (White, J., dissenting).

This is, incidentally, a curious position given that all three dissenters joined the Court's opinion in Finley v. United States, 490 U.S. 545 (1989) (per Scalia, J.), reasoning:

> The FTCA, § 1346(b), confers jurisdiction over "civil actions on claims against the United States." It does not say "civil actions that include requested relief against the United States," nor "civil actions in which there is a claim against the United States" — formulations one might expect if the presence of a claim against the United States constituted merely a minimum jurisdictional requirement, rather than a definition of the permissible scope of FTCA actions.

490 U.S. at 552.

With identical logic, the *Carnegie-Mellon* majority might have observed:

> Section 1447(c) dictates that "if . . . the case was removed improvidently and without jurisdiction, the district court shall remand the case." It does not say "if and only if the case was removed improvidently and without jurisdiction, the district court shall remand the case," nor "the district court shall not remand the case unless the case was remanded improvi-

enough to assess how the Court *has* treated the question of remand discretion. It remains to determine how the Court *should* approach the problem if it were next to arise. Part IV does what both *Thermtron* and *Carnegie-Mellon* failed to do: it analyzes the legislative history of section 1447(c) and the relevant context of jurisdictional provisions to determine whether courts should interpret the removal statutes to permit remand discretion over removed mixed cases.

IV. Remand Discretion and Statutory Interpretation

Part III began with the hypothesis that whether section 1447(c) provides the exclusive grounds for remand depends on whether one reads the statute's ambiguity to direct (1) that courts shall not remand for reasons other than procedural defect or lack of subject matter jurisdiction; or (2) that courts may, but are not required to, remand on unspecified grounds.[238] Clearly, *Carnegie-Mellon* rejects the prohibitory construction. But, as the preceding section intimated, the Court did not quite adopt the permissive construction either. To be sure, the Court could have reached the result it did by holding that section 1447(c) impliedly authorizes the courts to develop a common law of discretionary remand.[239] Instead, the Court refused to draw any inferences from the statute's silence. It seemed to assume that the lack of congressional direction returned the Court to a judicial equivalent of the State of Nature, a condition in which, absent legislative mandate, it could make law to conform to the demands of judicial economy, convenience, fairness, and comity.[240]

The problem with *Carnegie-Mellon* is that the Court resorted too hastily to its purported common law powers to craft jurisdictional law. It virtually[241] disregarded the prior question whether, utilizing stan-

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dently and without jurisdiction" — formulations one might expect if the two conditions constituted the sole permissible grounds for remand, rather than merely the only obligatory grounds for remand.

The two arguments are distinguishable only to the extent of one's subjective judgments regarding whether the alternative formulations in each passage are what "one might expect."

238. *See supra* text accompanying notes 189-92.

239. An implied authorization of remand discretion need not entail that such discretion is unconstrained. *See supra* note 190. Such a reading, therefore, would not be inconsistent with the Court's insistence in both *Thermtron* and *Carnegie-Mellon* that a district court does not have discretion to remand a case solely because of its overcrowded docket.

240. The courts of appeals routinely understand *Carnegie-Mellon* to have created a category of lawful, but extrastatutory, remand orders. *See, e.g.*, Rothner v. City of Chicago, 879 F.2d 1402, 1416 (7th Cir. 1989); Corcoran v. Ardra Ins. Co., 842 F.2d 31, 36 (2d Cir. 1988). Professor Mengler's recommendation that Congress codify *Carnegie-Mellon* by amending the removal statute, *see* Mengler, *supra* note 174, at 276 n.137, further indicates that the Court did not engage in statutory interpretation. If *Carnegie-Mellon* were a statutory decision, it would not need to be codified.

241. The Court did not represent that the removal statute offered no guidance for resolving the ambiguity. *See* 484 U.S. at 354-55:

[O]ne section of the removal statute strongly suggests that had Congress decided to address the proper disposition of removed cases involving pendent claims, Congress would have

dard methods of statutory construction,[242] it could interpret the statute's silence to provide meaningful direction.[243] This Part delves beyond the statute's superficial ambiguity.[244] It argues that the removal statute, properly construed, authorizes remand discretion to avoid a bifurcated suit. Consequently, mixed-case remand discretion need not rest on the Supreme Court's exercise of its common law power to supplement jurisdictional statutes.[245]

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authorized the district courts to remand them. In 28 U.S.C. § 1441(c), Congress dealt with the situation in which a claim that would be removable if sued upon alone is joined with one or more "separate and independent" claims that are not themselves removable. The section provides that the entire case may be removed and that the district court, in its discretion, may either adjudicate all claims in the suit or remand the independently nonremovable claims. . . . This section is not directly applicable to suits involving pendent claims . . . . The section, however, clearly manifests a belief that when a court has discretionary jurisdiction over a removed state-law claim and the court chooses not to exercise its jurisdiction, remand is an appropriate alternative. Thus, the removal statute, far from precluding district courts from remanding pendent state-law claims, actually supports such authority.

Although displaying very much the type of reasoning this Part advocates, *see infra* notes 260-63 and accompanying text, this lone passage hardly constitutes a sustained effort at statutory interpretation.

242. Of course, the identification of "standard" — let alone appropriate — methods of statutory interpretation has become increasingly problematic in recent years. This Part will examine both the recent legislative history of § 1447(c) and the broader statutory context to serve "imaginative reconstruction." *See infra* note 260 and accompanying text. It is beyond the scope of this Note either to canvass the extensive literature on statutory interpretation or to justify its methodology against all objections. This Part chooses the approaches it does because, in this particular situation, they appear to "work." *See* William N. Eskridge, Jr. & Phillip P. Frickey, *Statutory Interpretation as Practical Reasoning,* 42 STAN. L. REV. 321, 321-24, 345-62 (1990) (observing that, despite the proliferation of fundamentalist interpretative theories, courts properly employ practical reasoning that reflects a shifting variety of strategies).

243. This failing is all the more glaring given the Court's observation the previous term that "the touchstone of the federal district court's removal jurisdiction is . . . the intent of Congress." Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 66 (1987). Even Professor Shapiro, the most forceful proponent of common law discretion to decline the exercise of congressionally authorized jurisdiction, recognizes the necessary priority of statutory interpretation. *See, e.g.,* Shapiro, *supra* note 190, at 583 ("Congress has undoubted authority to expand or narrow the range of permissible discretion, and the challenge of responsible statutory construction is to determine the extent to which it has done so.").

244. In seeking to resolve a statute's facial ambiguity, interpreters often resort to the so-called canons of statutory interpretation. No established canon, however, seems to speak to § 1447(c)'s particular ambiguity. The most likely candidate, the interpretive canon, *expressio unius est exclusio alterius,* is not helpful. Its lesson could be only that Congress intended that procedural defect and lack of subject matter jurisdiction constitute the sole *obligatory* grounds for remand, a premise that this Note does not draw into question.

Moreover, courts and commentators have strenuously challenged continued use of the canons, arguing that they rest on unrealistic assumptions about the nature of the legislative process and impute omniscience to Congress. *See, e.g.,* WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 689-95 (1988); RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 278-83 (1990); Cass Sunstein, *Interpreting Statutes in the Regulatory State,* 103 HARV. L. REV. 405, 452 (1989) ("Almost no one has had a favorable word to say about the canons in many years."). *Expressio unius* has been a favorite target of such criticism, especially for statutory as opposed to constitutional interpretation. *See, e.g., In re* American Reserve Corp., 840 F.2d 487, 492 (7th Cir. 1988); ESKRIDGE & FRICKEY, *supra,* at 641-42. *But see* William N. Eskridge, Jr., *The New Textualism,* 37 UCLA L. REV. 621, 664 & n.173 (1990) ("*Inclusio unius* arguments have grown like weeds in a vacant lot during the last two Terms of the Court.").

245. The analytical distinction between an opinion that finds discretion not to exercise juris-

Section IV.A examines the legislative history of the 1988 amendment to section 1447(c).[246] It concludes that, whatever may have been the case prior to the amendment, the present provision does not easily sustain the prohibitory construction. On the contrary, it reflects probable congressional intent to authorize some degree of remand discretion beyond the grounds articulated. Section IV.B employs structural reasoning to give content to the unspecified degree of discretion that proper statutory interpretation should find in section 1447(c). To determine whether courts should construe the removal statute to authorize remand discretion following mixed-case removal, this section returns to the conflicting values outlined in Part II. It determines that Congress's pronounced recent bias against jurisdictional rules that force bifurcated litigation outweighs its qualified commitment to the exercise of federal question removal jurisdiction. This Part concludes that section 1447(c) should be interpreted, within the context of the congressional scheme of removal, to grant district courts discretion to remand entire removed mixed cases.

A. *28 U.S.C. § 1447(c): A Succinct Legislative History*

The Removal Act has a long and convoluted history.[247] Thankfully, it need not be recounted here. Whether or not early Congresses had intended to confer remand discretion, a minor amendment effected by the Judicial Improvements and Access to Justice Act of

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diction as a matter of statutory interpretation and one that reaches the same result through an exercise of the courts' common law power over matters of jurisdiction is firmly entrenched in the federal courts literature. Most conspicuously, it provides the foundation for Professor Redish's well-known argument that the Supreme Court's abstention doctrines are unconstitutional. *See generally* Redish, *Abstention, supra* note 224; Redish, *Judicial Parity, supra* note 224, at 348-49. While disagreeing vehemently with Redish's separation of powers argument, Shapiro emphasizes that courts can exercise their common law power not to hear a case without finding "that Congress necessarily 'intends' to confer such discretion when it authorizes the exercise of jurisdiction." Shapiro, *supra* note 190, at 574; *cf.* Freer, *supra* note 93, at 56-58 (criticizing the *Gibbs* Court's common law approach, but arguing that pendent and ancillary jurisdiction is properly derived from interpreting the statutory term "civil action").

Professor Althouse has argued that, when it comes to judicial determinations that lower federal courts have the discretionary power not to exercise jurisdiction, the alleged difference between statutory interpretation and judge-made law is illusory. Her point is not that the distinction is analytically false, but that it is empirically and proscriptively empty: scholars like Redish who seek to foreclose the latter avenue while preserving the former are bound to be frustrated. *See* Ann Althouse, *The Humble and the Treasonous: Judge-Made Jurisdiction Law*, 40 CASE W. RES. L. REV. 1035 (1990). Regardless of whether Althouse is right, two points are relevant at present. First, the Supreme Court *represented* that its decision in *Carnegie-Mellon* was the product of common law, and not statutory, methodology. Second, courts and scholars have yet to undertake a searching interpretation of § 1447(c).

246. The use of legislative history is especially controversial. Justice Scalia in particular has launched a well-documented attack on the use of legislative history to trump the "plain language" of a statute. *See generally* Eskridge, *supra* note 244. More recently, however, even Scalia has approved of recourse to the legislative history where, as here, the statute is facially ambiguous. *See id.* at 658 & n.144.

247. *See* Markowski, *supra* note 189, at 1088-94; *see also supra* note 63.

1988[248] renders inquiry into earlier legislative intent unnecessary.

The 1988 Judicial Improvements Act wrought several changes to the Judicial Code. The Act's principal contribution was to create a Federal Courts Study Committee to propose changes to federal jurisdictional law.[249] The legislation also, inter alia, increased the jurisdictional minimum in diversity cases;[250] amended the Rules Enabling Act;[251] authorized district courts, for a period of five years, to refer actions for nonbinding arbitration;[252] and modified section 1447(c) to establish a time limit for removals based on procedural defects.[253] Only one passage in the entire legislative history of the 1988 Act refers to section 1447(c). This single paragraph contains one statement profoundly relevant to the instant inquiry. According to the House Report, in amending section 1447(c) to provide that remands based on a defect in removal procedure must be sought within thirty days of removal, Congress intended "to avoid any implication that remand is unavailable after disposition of all federal questions leaves only State law questions that might be decided as a matter of ancillary or pendent jurisdiction or that instead might be remanded."[254]

This passage unequivocally endorses the result of *Carnegie-Mellon.* More importantly, however, by undermining the prohibitory interpretation, it provides strong support for the permissive construction of the statute. After the 1988 amendment, a proponent of the prohibitory construction must believe that Congress intended pendent claims to constitute a sui generis exception to the rule that district courts may not remand for any reason other than procedural defect or lack of subject matter jurisdiction. Such a proponent must believe, in other words, that there exist exactly three permissible grounds for remand. But, if so, Congress could have conveyed this intention much more clearly by amending the text than by burying the third of three statutory bases for remand in the legislative history. That Congress expressly recognized one extrastatutory basis for remand, without hinting that in so doing it intended to exhaust all permissible grounds for remand, implicitly refutes the prohibitory construction.[255]

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248. Pub. L. No. 100-702, 102 Stat. 4642 (1988).

249. Federal Courts Study Act, Pub. L. No. 100-702, 102 Stat. 4644 (1988).

250. Pub. L. No. 100-702, § 201(a), 102 Stat. 4642, 4646 (1988) (codified at 28 U.S.C. § 1332 (1988)).

251. Pub. L. No. 100-702, §§ 401-407, 102 Stat. 4642, 4648-52 (1988) (codified at 28 U.S.C. §§ 2072-2074 (1988)).

252. Pub. L. No. 100-702, §§ 901-907, 102 Stat. 4642, 4659-64 (1988).

253. *See supra* note 189.

254. H.R. REP. No. 889, 100th Cong., 2d Sess. 72 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5982, 6033; *see also* David D. Siegel, *Commentary on 1988 Revision, in* 28 U.S.C.A. §§ 1446-1650, at 53 (West Supp. 1993).

255. In a recent article, Professor Steinman ignores the 1988 amendment to § 1447(c), reiterating her earlier belief that *Carnegie-Mellon* was wrongly decided and observing that "it is perhaps less clear than it was before that the courts have the authority to express their decision to

To be sure, Congress could have expressly affirmed the permissive construction, but it did not do so. Consequently, the legislative history of the 1988 amendment of section 1447(c) provides more negative than positive information.[256] Quite probably, Congress never considered other possible scenarios that would raise the question whether remand might be proper. The final section inquires into Congress's "constructive intent" and suggests that *had* Congress considered the problem posed by mixed-case removal, it *would have* granted district courts discretion to remand the nonbarred claims.

B. *Delineating the Contours of Section 1447(c) Remand Discretion*

A recurrent conundrum in statutory interpretation arises when text and legislative history reveal that the authors of a statute, as amended, simply never envisioned the particular difficulty confronting the interpreter. Theorists have propounded numerous strategies to resolve the resultant statutory indeterminacy. Commentators at one extreme urge judges to interpret such legislation in accord with their own, necessarily subjective, normative judgments,[257] despite incessant attacks on the "unelected judiciary." At the opposite pole, judicial conservatives advocate "strict construction": because Congress legislates against a blank slate, a right, remedy, or power does not exist unless Congress has affirmatively and clearly created it.[258] However, it seems that only a substantive commitment to *political* conservatism can justify such a strong bias in favor of legislative inaction.[259]

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decline supplemental jurisdiction over a removed claim by remanding it when no statute authorizes remand." Joan Steinman, *Supplemental Jurisdiction in § 1441 Removed Cases: An Unsurveyed Frontier of Congress' Handiwork,* 35 ARIZ. L. REV. 305, 319 (1993).

256. Of course, the significance of the negative information is considerable. Congress could preclude even common law expansions of remand grounds if it so chooses. *See* Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 354 (1988). As noted, Shapiro, the chief proponent of jurisdictional discretion, acknowledges that Congress has the power to, and occasionally does, eliminate the courts' discretion to decline jurisdiction. *See* Shapiro, *supra* note 190, at 547 n.23, 583.

257. In his well-known chain novel metaphor, Ronald Dworkin would entrust courts to interpret unclear statutes to "best fit" the polity's substantive normative principles. *See* RONALD DWORKIN, LAW'S EMPIRE 313-54 (1986); *see also* Sunstein, *supra* note 244, at 462-68 (proposing that courts craft candidly normative canons of interpretation).

258. *See, e.g.,* Frank H. Easterbrook, *Statutes' Domains,* 50 U. CHI. L. REV. 533, 544-45, 552 (1983) (proposing that unless a statute either provides a clear rule of decision or empowers courts to fashion common law, it does not apply to the dispute).

259. *See, e.g.,* POSNER, *supra* note 244, at 290-92. Strict constructionists often justify their position with the observation that, even if Congress would probably have preferred a different result, Congress can proceed to legislate that change. *See, e.g.,* Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 576 (1982) (Rehnquist, J.). Of course, Congress would be just as free to amend the statute if the courts interpreted it expansively.

Moreover, such an argument is overly sanguine — or, more likely, all too realistic — about the ease and speed with which Congress can reverse judicial decisions. Congressional inertia is especially acute when it comes to jurisdictional legislation. *See* Roscoe Pound, *Reforming Procedure by Rules of Court,* 76 CENT. L.J. 211, 212 (1913) ("Experience has shown that small details of procedure, which sometimes are very irritating in their effects, do not interest the legislature so that it is almost impossible to correct them by enactment."); *see also* Daniel A.

This section will adopt a third approach. It will try to imagine what Congress would have done had it considered a problem that, ex hypothesi, it did not — an endeavor that Judge Posner has approvingly termed "imaginative reconstruction"[260] and that the Supreme Court has pursued in closely analogous circumstances.[261] To be sure, the approach is not free of difficulty. Critics have scoffed at the notion that judges can "think themselves into the minds of the enacting legislators."[262] This criticism, which can be telling, gains force with the passage of time from enactment. However, this section will attempt only indirectly to peer into the minds of the legislators; it focuses, rather, on their handiwork.

The challenge, specifically, is to surmise what Congress — that is, the Congresses of 1988 and 1990[263] — would have directed had it

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Farber, *Statutory Interpretation, Legislative Inaction, and Civil Rights,* 87 MICH. L. REV. 2, 10 (1988); Thomas D. Rowe, Jr. & Kenneth D. Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction,* 135 U. PA. L. REV. 7, 9 (1986) (commenting that minor failings in the jurisdictional scheme usually go unaddressed by Congress because "technical aspects of federal court jurisdiction rank among the legal topics having the least political appeal."). *But see* Michael E. Solimine, *Rethinking Exclusive Federal Jurisdiction,* 52 U. PITT. L. REV. 383, 420-24 (1991) (noting that Congress does amend the jurisdictional statutes fairly often); Michael E. Solimine & James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions,* 65 TEMPLE L. REV. 425, 451 n.120 (1992) (same).

260. POSNER, *supra* note 244, at 269-78; POSNER, *supra* note 175, at 286-93. Imaginative reconstruction shares obvious affinities with legal process theory's purposive analysis. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1413-17 (tentative ed. 1958). The central difference is that modern imaginative reconstruction, informed as it is by public choice theory, does not assume that legislatures pursue uniform and "reasonable" purposes. In reconstructing counterfactual intent, it can take better account of Congress's simultaneous pursuit of diverse, even conflicting, interests.

261. In Rose v. Lundy, 455 U.S. 509 (1982), the Court held that federal courts must dismiss habeas corpus petitions that included both claims for which petitioner had exhausted his state remedies and nonexhausted claims. Its approach is instructive:

> Because the legislative history of § 2254, as well as the pre-1948 cases, contains no reference to the problem of mixed petitions, in all likelihood Congress never thought of the problem. Consequently, we must analyze the policies underlying the statutory provision to determine its proper scope. . . . *Unexcelled Chem. Corp. v. United States,* 345 U.S. 59, 64 (1953) ("Arguments of policy are relevant when for example a statute has an hiatus that must be filled or there are ambiguities in the legislative language that must be resolved.").

455 U.S. at 516-18 (footnotes omitted); *see also supra* note 241.

262. T. Alexander Aleinikoff, *Updating Statutory Interpretation,* 87 MICH. L. REV. 20, 25-26 (1988); Easterbrook, *supra* note 258, at 550-51. For a critical though less dismissive appraisal, see Eskridge & Frickey, *supra* note 242, at 329-32; Sunstein, *supra* note 244, at 433 & n.99.

263. The 100th Congress was the most recent to amend § 1447(c) itself. The 101st Congress, however, enacted several changes to chapter 89, which is generally termed "the removal statute." Although the two Congresses were, by definition, not identical, neither were they fully distinct. It would push formalism to extremes to refuse to attribute any of the 1990 legislation that implemented the recommendations of the Federal Courts Study Committee to the 1988 legislation that gave birth to that same Committee.

Because this section seeks to "reconstruct" the intent of Congresses from the very recent past, the endeavor will come to look very much like general contextual reasoning. The Supreme Court has especially favored contextual reasoning when interpreting jurisdictional legislation. *See* Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804 (1986):

> If the history of the interpretation of judiciary legislation teaches us anything, it teaches the duty to reject treating such statutes as a wooden set of self-sufficient words. . . . The Act of

thought to define a district court's options when, after defendants have removed a mixed case, the court must remand claims barred by the Eleventh Amendment. To answer this challenge, this section tries to gauge congressional commitment to each of the conflicting values outlined in Part II. First, Congress has consistently invested district courts with discretion to avoid a bifurcated suit. Second, Congress has enacted, and acceded to, a host of doctrines that serve effectively to constrict a defendant's federal question removal privilege. This section concludes that the totality of federal jurisdictional legislation manifests constructive congressional intent for district courts to possess remand discretion over mixed cases to avoid a bifurcated suit.

1. *Discretion To Avoid a Bifurcated Suit*

To the extent that a general concern with judicial economy drives congressional opposition to piecemeal litigation, it might be worthwhile to examine Congress's repeated actions in recent years to promote efficient use of judicial resources.[264] This section undertakes a narrower inquiry, for recent changes in the law of federal jurisdiction wrought by the 1988 and 1990 Acts manifest a specific congressional commitment to avoid bifurcated suits. A 1988 amendment to the removal act and the 1990 enactment of supplemental jurisdiction provide telling illustrations.

First, in the 1988 Act, Congress enacted section 1447(e) to address postremoval joinder of diversity-destroying defendants. The provision authorizes the district court either to "deny joinder, or permit joinder and remand the action to the State court."[265] Only Congress's greater hostility to expanding diversity jurisdiction outweighed its sentiment to grant district courts the even broader discretion to permit joinder and retain jurisdiction.[266] Even without this third potential option, however, Congress could reasonably have expected that district courts will most frequently exercise the second alternative — to permit joinder and remand to the state court — thereby preventing a bifurcated suit.[267]

1875 . . . has been continuously construed and limited in the light of the history that produced it, the demands of reason and coherence, and the dictates of sound judicial policy which have emerged from the Act's function as a provision in the mosaic of federal judiciary legislation.

478 U.S. at 810 (quoting Romero v. International Terminal Operating Co., 358 U.S. 354, 379 (1959)).

264. *See supra* note 180.

265. 28 U.S.C. § 1447(e) (1988) (corresponding to Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1016(c)(2), 102 Stat. 4642, 4670 (1988)).

266. *See supra* note 98.

267. *See* Oakley, *supra* note 182, at 756 (noting that "because the . . . option of joinder plus remand not only conserves federal judicial resources but is also unappealable, the joinder and remand option that Congress took the pains expressly to authorize ought to prove popular with federal judges") (footnote omitted).

Congress's codification of supplemental jurisdiction probably constitutes the single most compelling indication of congressional commitment to limit drastically piecemeal litigation. Consider the text itself:

> § 1367. Supplemental Jurisdiction
>
> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy . . . . Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.
>
> . . . .
>
> (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if —
>
> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.[268]

The mandatory terms of subsection (a) combine with the relatively strict standards for dismissal outlined in subsection (c) to create a strong presumption in favor of the federal courts' exercise of supplemental jurisdiction and a correspondingly small likelihood that the action will be bifurcated. Commentators disagree whether the resulting discretion to decline exercise of supplemental jurisdiction is the same as, or narrower than, that provided by the Supreme Court in *United Mine Workers v. Gibbs,*[269] and advocated by the Federal Courts Study Committee.[270] At the very least, however, the first clause of section

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268. 28 U.S.C. § 1367 (Supp. IV 1992).

269. 383 U.S. 715 (1966).

270. *See* STUDY COMMITTEE REPORT, *supra* note 175, pt. II, at 47-48 (recommending that Congress authorize pendent and ancillary jurisdiction and provide the district courts with discretion to dismiss state claims if "warranted in the particular case by considerations of fairness or economy").

Although the House Judiciary Committee claimed that subsection (c) merely codified existing law, H.R. REP. No. 734, 101st Cong., 2d Sess. 29 (1990), Professor Oakley has termed the report misleading, demonstrating persuasively that the resulting statutory test for declining supplemental jurisdiction is more stringent than then-existing law. Oakley, *supra* note 182, at 766-68 & n.118. Professor Larry Kramer, the Reporter to the Subcommittee on the Role of the Federal Courts and Their Relation to the States, disputes this characterization, claiming that Congress intended to codify the *Gibbs* factors and that any apparent discrepancy is an unintentional product of the disjointed legislative drafting process. Personal Communication with Larry Kramer, Professor of Law, University of Michigan, in Ann Arbor, Michigan (Apr. 12, 1993).

In any event, Congress clearly rejected the advice of commentators who had urged that it "strongly encourage" district courts to decline supplemental jurisdiction when in the interests of federalism and comity. *See, e.g.*, Mengler, *supra* note 174, at 250.

1367 strengthens the exercise of supplemental jurisdiction relative to the pre-*Finley* law by preventing the Court from inferring exceptions to subsection (a).

The history animating section 1367 reveals even more than the text, for Congress adopted the statute specifically to overrule the Supreme Court's opinion in *Finley v. United States.*[271] Prior to *Finley,* in *Aldinger v. Howard*[272] the Court had rejected the use of pendent party jurisdiction to bring a state law claim against a county on the tails of a claim against county officials under 42 U.S.C. § 1983. In emphasizing that Congress's failure to make municipal corporations liable under section 1983 implies a concomitant choice not to extend federal jurisdiction to state law claims against the county,[273] the Court left open the possibility that pendent party jurisdiction could be available in other circumstances. In particular, the *Aldinger* Court intimated that pendent party jurisdiction would probably be available were the federal claim within exclusive federal jurisdiction, thereby forcing the plaintiff either to bifurcate her suit or to drop the state law claims:

> When the grant of jurisdiction to a federal court is exclusive, for example, as in the prosecution of tort claims against the United States under 28 U.S.C. § 1346, the argument of judicial economy and convenience can be coupled with the additional argument that *only* in a federal court may all of the claims be tried together.[274]

In *Finley* the Court confronted the exact situation presaged by *Aldinger* but held that the jurisdictional statutes could not be construed to permit pendent-party jurisdiction. It remarked casually that "the efficiency and convenience of a consolidated action will sometimes have to be forgone in favor of separate actions in state and federal courts."[275] The dissents,[276] followed by academic commentators,[277] roundly criticized the *Finley* majority for crafting jurisdictional rules that serve to force plaintiffs either to forgo valid causes of action or to assume the expense and inconvenience of litigat-

271. 490 U.S. 545 (1989).

272. 427 U.S. 1 (1976).

273. 427 U.S. at 16-19. The Court subsequently overruled its prior holding that municipalities are not "persons" for purposes of § 1983 in Monell v. Department of Soc. Servs., 436 U.S. 658 (1978).

274. 427 U.S. at 18.

275. *Finley,* 490 U.S. at 555.

276. *See* 490 U.S. at 558 (Blackmun, J., dissenting) ("Where, as here, Congress' preference for a federal forum for a certain category of claims makes the federal forum the *only* possible one in which the constitutional case may be heard as a whole, the sensible result is to permit the exercise of pendent-party jurisdiction."); 490 U.S. at 577 (Stevens, J., dissenting) ("[T]here is reason to believe that Congress did not intend that the substance of the federal right be diminished by the increased costs in efficiency and convenience of litigation in two forums.").

277. *See, e.g.,* Mengler, *supra* note 174; *see also* Wendy C. Perdue, Finley v. United States: *Unstringing Pendent Jurisdiction,* 76 VA. L. REV. 539 (1990) (criticizing *Finley*).

ing on two fronts. Congress reacted quickly and decisively, following the Federal Courts Study Committee recommendation to enact supplemental jurisdiction.[278] The House Report acknowledged that Congress intended to overrule *Finley*.[279]

The reader will note that *Finley* produced precisely the same Hobson's choice as does mixed-case removal: the plaintiff must either bifurcate her suit or forgo potentially valid claims. To preserve the opportunity for a single suit, Congress responded to *Finley* by granting district courts discretion to hear claims not otherwise within their limited jurisdiction.[280] Likewise, the inference follows, Congress would have responded to *Henry* by granting district courts discretion to remand claims firmly within their jurisdiction.

2. *The Need for District Courts To Exercise Federal Question Removal Jurisdiction*

The situations are not exactly analogous, of course, because the congressional response to *Finley* — section 1367 — expanded federal jurisdiction over state law claims. In contrast, the hypothesized-response to *Henry* would entail conferring district court discretion to relinquish jurisdiction over federal question claims.[281] Clearly, adjudicating questions arising under federal law constitutes the central function of the federal judiciary. However, whether this distinction makes a difference hinges upon the magnitude of congressional commitment to the principle that, upon the defendant's election, all federal question claims should be adjudicated in federal district court.

This section reveals that Congress has in fact established several doctrines that, in the aggregate, significantly constrain a defendant's ability to secure a federal forum to adjudicate questions of federal law. Additionally, Congress has impliedly devalued federal question removal pursuant to section 1441(a) by its grant of "absolute" removal rights under other provisions of the Judicial Code. This section concludes that congressional commitment to federal question removal jurisdiction is not of sufficient intensity to outweigh that body's manifest opposition to jurisdictional rules that force piecemeal litigation.

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278. STUDY COMMITTEE REPORT, *supra* note 175, pt. II, at 47; *see also* STUDY COMMITTEE PAPERS, *supra* note 93, at 552-59.

279. H.R. REP. NO. 734, 101st Cong., 2d Sess. 28 (1990).

280. To be sure, § 1367 responds to more than the problem of the bifurcated suit, for it permits supplemental jurisdiction even when the federal question claim lies within the states' concurrent jurisdiction. Nonetheless, advocates of supplemental jurisdiction seemed particularly incensed by the *Finley* Court's elimination of the opportunity for plaintiff to prosecute all her claims in a single forum. *See* STUDY COMMITTEE PAPERS, *supra* note 93, at 558; *see also supra* note 276.

281. It bears emphasis that authorizing remand discretion over mixed cases is not equivalent to constricting federal question jurisdiction. Congress would constrict jurisdiction only if it were to follow *McKay* in holding mixed cases to be nonremovable. Investing courts with remand discretion confers power to *choose* to decline jurisdiction.

The absence of federal defense removal indicates most conspicuously that Congress perceives only a limited interest in district court adjudication of federal questions at defendants' behest. Commentators at least since the time of Professor Wechsler have urged that it would be more sensible to allow defendants to remove based on a federal defense than on a federal claim.[282] To be sure, there may be sound practical reasons to retain the present system.[283] But just as surely, the long-standing unavailability of federal defense removal bespeaks a widely held perception that the national interest in affording federal jurisdiction over questions of federal law diminishes when the defendant rather than the plaintiff seeks the expertise and independence of the federal tribunal.

Less obvious, perhaps, but more telling, is the 1990 amendment to section 1441(c). Recall that Congress expanded district court remand discretion over separate and independent claims from "matters not otherwise within its original jurisdiction" to "matters in which State law predominates."[284] Questions regarding section 1441(c)'s utility notwithstanding,[285] the relevant point is that the only effect of the change in wording is to enable district courts to remand claims technically within their "arising under" jurisdiction.[286]

There are yet other rules of significance. Consider, for example, the bar to appellate review of remand orders embodied in section 1447(d). Congress enacted the rule "to prevent the additional delay which a removing party may achieve by seeking appellate reconsideration of an order of remand,"[287] even though it certainly appreciated that the district court would sometimes err in remanding a properly removed federal question claim.[288] In other words, section 1447(d) reflects congressional commitment to reduce litigation delay and harassment even at the certain cost that some defendants would be forced to defend against federal question claims in state court. The thirty-day removal deadline imposed by section 1446[289] and the rule that all de-

282. Wechsler, *supra* note 168, at 233-34.

283. For example, Judge Posner has argued that defendants' greater incentive to delay advises against providing for federal defense removal. *See* POSNER, *supra* note 175, at 190-91.

284. 28 U.S.C. § 1441(c) (Supp. IV 1992) (codifying Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 312, 104 Stat. 5089, 5114). *See supra* note 105.

285. *See supra* note 109.

286. *See* Siegel, *supra* note 109, at 5 ("If 'matters' is construed to include all 'claims', then a combination of claims in which a federal claim is one but in which state law is found to 'predominate' may justify a remand of the whole case, with the federal claim included."). Mistakenly believing that the 1990 amendment *reduced* district court remand discretion, Oakley was befuddled by the change. *See* Oakley, *supra* note 182, at 750 ("It is difficult to see what policy interests are served by narrowing a district court's power to remand an unrelated claim after its section 1441(c) removal.").

287. Thermtron Prods. Inc. v. Hermansdorfer, 423 U.S. 336, 354 (1976) (Rehnquist, J., dissenting).

288. *See* 423 U.S. at 355 (Rehnquist, J., dissenting).

289. *See supra* note 76.

fendants must consent to a removal petition[290] further evince congressional willingness to constrict defendants' ability to secure a federal forum in defense of claims arising under federal law.

Finally, it bears mention that these several constraints do not apply equally to all statutory grants of a right to remove. Most notably, section 1447(d) expressly excepts from its bar to appellate review of remand orders cases removed pursuant to section 1443, which grants a right of removal upon persons unable to secure civil rights in state court.[291] Section 1442(a) permits members of the armed forces to remove civil suits beyond the usual thirty days.[292] Additionally, courts have termed the rights conferred by several distinct removal provisions "absolute" to distinguish them from the right conveyed by section 1441(a).[293] As one consequence, foreign states can remove actions pursuant to section 1441(d), and federal officers can remove pursuant to section 1442, with or without the consent of codefendants.[294]

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290. Originally, this rule was probably more a judicial than congressional creation, *see supra* note 75, and recent commentators have criticized the notion that mere legislative silence in the face of judge-made law signifies congressional acquiescence. *See, e.g.*, Johnson v. Transportation Agency, 480 U.S. 616, 671-72 (1987) (Scalia, J., dissenting); POSNER, *supra* note 175, at 282-83; Donald L. Doernberg, *"You Can Lead a Horse to Water . . .": The Supreme Court's Refusal To Allow the Exercise of Original Jurisdiction Conferred by Congress*, 40 CASE W. RES. L. REV. 999, 1007-09 (1989-1990). *See generally* William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67 (1988). Of course, negation of the claim that silence necessarily manifests approval does not entail affirmation of the contrary claim that silence cannot indicate assent. *See* Farber, *supra* note 259, at 8-11. Given Congress's certain awareness of the unanimous consent doctrine, and many opportunities to amend it, it is reasonable to infer that the rule represents congressional will.

291. 28 U.S.C. §§ 1443, 1447(d) (1988); *see also* 12 U.S.C. § 1819 (b)(2)(C) (Supp. IV 1992) (providing for direct appellate review of orders remanding actions removed by the Federal Deposit Insurance Corporation).

292. 28 U.S.C. § 1442a (1988).

293. For a thorough discussion citing numerous cases, see 14A WRIGHT ET AL., *supra* note 34, §§ 3727-3729. Courts have conferred heightened status upon 28 U.S.C. § 1441(d) (1988) (permitting removal by foreign states); 28 U.S.C. § 1442 (1988) (removal by federal officers); 28 U.S.C. § 1442a (1988) (removal by members of the armed forces); 28 U.S.C. § 1443 (1988) (protection of civil rights); 28 U.S.C. § 1444 (1988) (foreclosure actions against the United States).

294. *See, e.g.*, Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371, 1375 (5th Cir. 1980) (noting that legislative history of § 1441(d) suspends the unanimous consent rule); Behre v. United States, 659 F. Supp. 747 (D.N.H. 1987) (removal pursuant to § 1442(a)(1)).

Behre is a complex and interesting case. Plaintiffs filed suit in New Hampshire state court alleging federal and state causes of action and naming, among others, federal officers, state agencies, and private individuals. The federal officers removed pursuant to § 1442(a). Plaintiffs moved to remand, "arguing that the Eleventh Amendment bars [the federal court] from exercising jurisdiction over the state defendants and that reasons of judicial economy, comity, and respect for civil rights plaintiffs' choice-of-law forums militate in favor of remanding the entire action." 659 F. Supp. at 748. Only the federal officers objected to remand.

The court remanded the claims against the state defendants on Eleventh Amendment grounds. It also held that § 1442 confers an absolute right of removal upon the federal officers thereby precluding remand. Finally, the court remanded the claims against the remaining defendants, reasoning as follows:

> Except for Counts One and Two, all of the claims against these defendants arise under state law. Moreover, these parties did not seek the removal to this court, nor did they object to plaintiffs' motion to remand. Given that this action must unfortunately be litigated in two

The significant point, of course, is that not all grants of removal jurisdiction are equally important. The extension of removal rights to, for example, foreign states and federal officers is sufficiently compelling[295] that Congress and the courts have chosen to relax otherwise applicable restrictions on removal. The right of removal under section 1441(a), it necessarily follows, is of a lesser order. Thus, Congress has devalued federal question removal relative both to original federal question jurisdiction and to particular removal grants.[296]

Federal jurisdiction over *difficult* questions of federal law might be extremely important. But Congress does not deem federal question jurisdiction over run-of-the-mill claims, at a defendant's behest and over the plaintiff's objection, sufficiently important to trump its growing aversion to jurisdictional rules that effectively force piecemeal litigation. The general policy in favor of federal question removal is riddled with exceptions and procedural limitations that reflect congressional willingness to allow district courts not to exercise removal jurisdiction over federal questions. Consequently, if Congress were to address this situation, it very likely would expressly authorize discretion to remand mixed cases removed pursuant to section 1441(a).[297]

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forums, the Court finds that justice would best be served by remanding all of the defendants other than the individual federal officers to state court.

659 F. Supp. at 751. The court did not address whether it would have remanded the federal causes of action against the private defendants had they objected.

295. *See, e.g.*, Willingham v. Morgan, 395 U.S. 402 (1969):

> [T]he federal government "can act only through its officers and agents, and they must act within the States. If, when thus acting . . . those officers can be arrested and brought to trial in a State court, for an alleged offence against the law of the State . . . and if the general government is powerless to interfere at once for their protection, — if their protection must be left to the action of the State court, — the operations of the general government may at any time be arrested at the will of one of its members." For this very basic reason, the right of removal under § 1442(a)(1) is made absolute . . . .

395 U.S. at 406 (quoting Tennessee v. Davis, 100 U.S. 257, 263 (1879)); H.R. REP. NO. 1487, 94th Cong., 2d Sess. 32 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6631 ("In view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area, it is important to give foreign states clear authority to remove to a Federal forum actions brought against them in the State courts.").

296. For further recognition that not all grants of federal jurisdiction are created equal, see COMPLEX LITIGATION PROJECT, *supra* note 176, § 4.01, at 221 (proposing a "Complex Litigation Panel" to manage complex multidistrict litigation and excepting from the panel's authority to transfer actions from federal to state court cases removed to federal court pursuant to 28 U.S.C. §§ 1441(d), 1442, 1443, and 1444).

297. A permissive construction of § 1447(c) need not disturb the regime created by the interaction of *Thermtron* and *Carnegie-Mellon:* remands for a reason other than procedural defect or lack of subject matter jurisdiction might be lawful, but are subject to appellate review by mandamus. True, the availability of any appellate review of remand orders cuts against the concern with judicial economy that, in part, underlies the argument for mixed-case remand discretion. But, if appellate review of discretionary remand orders proves too wasteful of judicial resources, the review mechanism can be reformed to minimize delay and expense. *See* Jerome I. Braun, *Reviewability of Remand Orders: Striking the Balance in Favor of Equality Rather than Judicial Expediency,* 30 SANTA CLARA L. REV. 79 (1990) (proposing summary appellate procedures, including review by a single appellate judge instead of the customary three-judge panel in all cases of remand in which removal is predicated on a federal question, and terming the consequent increase in workload "insignificant"). Practical limits upon appellate review of discretion-

But this prediction does not countenance waiting for explicit congressional affirmation.[298] Following established principles of statutory construction, lower courts should assume that discretion now.

CONCLUSION

The presence of claims barred by the Eleventh Amendment does not prevent removal of a case that also contains federal question claims against private defendants. After removal, the Amendment bars the district court from adjudicating the plaintiff's claims against the state defendants. The district court should remand rather than dismiss the barred claims. Considerations of judicial economy, convenience, and fairness to the plaintiff all disfavor the resulting bifurcated suit. Accordingly, sound policy reasons advise that the district court should remand the nonbarred claims as well if these factors outweigh the importance that a federal court exercise its jurisdiction over the federal questions presented in the particular case. No court has yet contemplated that it might possess the power to remand those claims on such discretionary grounds. This Note has identified and sought to rectify this unfortunate oversight. District courts probably enjoy common law power, under the Supreme Court's opinion in *Carnegie-Mellon University v. Cohill,* to remand cases in exceptional circumstances in the interests of judicial economy, convenience, and fairness. Similarly, the most reasonable construction of the remand statute authorizes district court discretion to remand claims in order to avoid a bifurcated suit. Consistent with either analysis, a district court need not adjudicate the nonbarred federal question claims of a removed case after it has remanded claims barred by the Eleventh Amendment to state court. In cases not involving the Eleventh Amendment, it remains for creative courts and litigators to investigate more fully the implications of both the common law and statutory approaches to discretionary remand.

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ary remand orders should not occasion alarm. *Cf.* Mengler, *supra* note 174, at 277 (noting that much of a district court's present discretionary power is "largely unreviewable").

298. *See supra* note 259.